869

ADMINISTRATIVE LAW BULLETIN

NOVEMBER 1953/54

• Vol. 6 • No. 1

ADMINISTRATIVE LAW SECTION of AMERICAN BAR ASSOCIATION

Copyright 1953 by
The American Bar Association

Editor: Bernard Schwartz
Professor of Law, New York University School of Law

CONTENTS

Administrative Rule-Making Power in France	1
Debate on Examiners	10
Examiners and the APA	12
APA and Preclusion of Review	18
Other Supreme Court Cases	23
Report of the Committee on Communications	31
Chairman's Page	31
Organization, 1953-1954	45

ADMINISTRATIVE RULE-MAKING POWER IN FRANCE

1. *Inherent or Delegated Power?* The American lawyer who examines the administrative rule-making power in France is immediately struck by the fact that, in the French system, the administration is invested with an inherent authority to promulgate rules which have the force of law. This is something which is foreign to Anglo-American conceptions of Executive authority, for, with us, the administration possesses only the rule-making authority which has been delegated to it by the legislature—a principle dramatically reaffirmed by *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the famous steel seizure case.

It is true that, even in the common-law world, the extent of administrative rule-making power has been drastically altered in the last fifty years. If, as the Report of the Attorney General's Committee on Administrative Procedure pointed out, "the promulgation of general regulations by the Executive, acting under statutory authority, has been a normal feature of federal administration ever since the Government was established," (*Report*, 97) the area of administrative authority has certainly increased by leaps and bounds since the founding of the American Republic. In mere point of view of volume, indeed, the amount of administrative rule-making completely dwarfs the number of statutes enacted by the Federal Congress. And what is true of volume is true also of degree of authority. Anglo-American legislatures are tending more and more to enact legislation on the "skeleton" type, which lays down only the broadest standards to limit the administrative rule-making power. In such cases, the flesh and the blood—not to mention the soul—of the scheme of legislative regulation have to be provided by the rules promulgated by the administration.

Yet, even though the administrative rule-making power is an enormous one today in

Nothing contained herein shall be construed as the action of the American Bar Association unless the same shall have been first approved by the House of Delegates or the Board of Governors.

the common-law world, it is still one which has its source in delegations by the legislature. In Anglo-American theory, it is only the elected representatives of the people who have been vested with the inherent power to legislate. Other governmental organs may exercise legislative authority only by virtue of an express grant of such authority from the legislature. It is in this sense that the Anglo-American lawyer has become accustomed to the term "delegated legislation," as indicating the exercise by the administration of rule-making authority which has been delegated to it.

It is its possession of only delegated rule-making authority that characterizes the Anglo-American administration as compared with its French counterpart. In the French system, the administration is vested, in addition to the authority conferred upon it by the legislature, with inherent rule-making powers, which exist even in the absence of legislative delegation.

The French Constitution, like the American one, contains a general direction to the head of the Executive branch to ensure the execution of the laws. It has been argued by some that the grant in Article III of the American Constitution to the President to "take care that the laws be faithfully executed" implies a vast residue of authority in the Executive—fully as sweeping as that inferred from the "necessary and proper" clause of Article I. "It would seem to include the power to take all steps 'which shall be necessary and proper for carrying into execution' the laws of the United States, except those which conflict with Constitution or statute. The Executive power is thus not limited to specific constitutional or statutory grants, but includes the power to take measures and exercise authority not specifically conferred." *(Schwartz, in 20 N.Y.U. L.Q. Rev. 465, 486 (1945)).*

Although this view of inherent Executive power finds support in the opinion of Mr. Justice Miller in *In re Neagle,* 135 U.S. 1, 63-64 (1890), it has not been generally approved, for it is inconsistent with the basic principle which requires the rule-making authority of the American administration to have its source in a legislative delegation. In the French system, on the contrary, the view of an inherent administrative rule-making power derived from a grant of the authority to ensure the execution of the laws is that which has been generally adopted.

Under the Constitution of 1946, the French Prime Minister *(Président du Conseil)* is the head of the Executive branch, and it is he who is charged with the execution of the laws. As far as his rule-making authority is concerned, he has no need of an express legislative delegation. A general rule-making authority is to be found in his "inherent powers." This is the term used by the Council of State (the supreme administrative-law court in France) in a famous 1919 case, where the Executive power was expressly stated to be based upon the constitutional charge to ensure the execution of the laws.

Under the French theory, the inherent rule-making authority of the Executive is a very broad one. It includes the power to promulgate any rule which is deemed neces-

sary to promote public order, safety, health and tranquility—which, in effect, means any rule which the Executive deems to be in the public interest. Nor, it should be noted, is the inherent power to issue such rules limited to the head of the French Executive. It is true that only the Prime Minister has the general authority to promulgate rules regulating any aspect of the national life. But cabinet ministers, too, may, without statutory authorization, in the words of a 1936 case, issue rules which may be necessary for the proper operation of the administration placed under their control. And the various local authorities possess similar powers. Thus, the prefects and the mayors possess inherent authority to promulgate rules regulating public order, safety, and health in the departments and communes.

It should not, however, be thought that the inherent rule-making power possessed by the administration in France is an unlimited one. In the French, as in the Anglo-American system, the administrative rule-making authority is considered as an essentially subordinate one. In Anglo-American theory, the subordinate character of the rule-making power flows naturally from its source in a delegation from the legislature. "The power to legislate, when delegated by Parliament, differs from Parliament's own power to legislate. Parliament is supreme and its power to legislate is therefore unlimited. . . . But any power delegated by Parliament is necessarily a subordinate power, because it is limited by the terms of the enactment whereby it is delegated." (*Report of the Committee on Ministers' Powers*, 20).

In the French system also, the rule-making power of the administration is inferior to the law-making authority of the legislature. As one writer expresses it: "The hierarchy of legislators continues down to the administrative legislator and, just as an ordinary law is subordinate to the Constitution, so is an administrative rule subordinate, in its turn, to the ordinary law. Thus, an administrative rule may not be contrary to a statute or modify its terms." The rule-making authority of the French administration, though not derived from Parliament, is thus subordinate to the legislative power to the extent that it cannot suspend, alter, or repeal existing laws; that it is not allowed to act *contra legem*.

The subordination of the rule-making power to the authority of the legislature has important consequences in limiting the inherent rule-making power of the French administration. In the first place, as has already been stated, an administrative rule cannot be contrary to existing statute-law. And, just as significant, is the fact that, in the French system, it is only a statute which can bring about certain legal results. For example, it is only the French legislature which can impose a new tax or increase an existing tax. And, similarly, the administration cannot itself promulgate rules which impose penalties upon private individuals not provided for by the legislature. Nor can an administrative rule be issued which is retroactive in effect. The legislature alone can produce such effect in the French theory.

2. *Restrictions Upon Delegation.* Insofar as the inherent rule-making power of the administration is concerned, there is a

great difference between the French and the Anglo-American systems. Even with the limitations that have been noted, the administration in France still possesses inherent authority to promulgate rules, far broader than that vested in administration in the common-law world.

With regard to delegations of authority to the Executive, the Anglo-American lawyer who examines the French system will tend to find more resemblance to the system with which he is familiar. In this respect, a sharp differentiation must first be made between the situation in Britain and that which prevails in the United States. British constitutional law rests upon the doctrine of the supremacy of Parliament. That doctrine is wholly inconsistent with the notion of restrictions upon the power which can be delegated to the Executive. There are thus no limitations in Britain to restrain Parliament from assigning authority where and how it will. In the American system, on the contrary, grants of power by the legislature are subject to scrutiny by the courts to see that they are not inordinate. In Great Britain, excessive delegations of Parliamentary powers are political concerns; in the United States, they are primarily judicial.

Paradoxical though it may sound, both the American and the British administrative lawyer will find points of similarity to his own system in the French law on the subject of delegations of power to the administration. Thus, the American will immediately feel at home on finding that the French system, like his own, is based upon the doctrine against the delegation of legislative power to the Executive. As stated in a contemporary treatise on French administrative law, "In effect, Parliament does not possess the legislative function as an inherent and original power; it has been delegated to it by the Constitution. Parliament thus possesses, not a right which it can delegate at will, but a competence which the Constitution obliges it itself to exercise. It cannot legally delegate its legislative functions to the Government. Such a delegation would be unconstitutional."

In the American system, it is well known that the doctrine against delegation has not prevented the legislature from conferring powers which are legislative in nature upon the Executive. It has, indeed, come to be seen that a literal application of the doctrine against delegation could well make effective modern government impossible. The need for delegations under present-day conditions is perhaps nowhere better put than in the British Report of the Committee on Ministers' Powers. "The truth is," reads the Committee's conclusion on the subject, "that if Parliament were not willing to delegate law-making power, Parliament would not be able to pass the kind and quantity of legislation which modern public opinion requires" (*Report*, 23)—a conclusion which applies with equal force to the American Congress.

The fact that the doctrine against delegation does not prevent the grant of powers which are legislative in nature to the American administration does not, however, mean that there are no restrictions upon delegations to the Executive in the United States. The approach to the delegation problem in this country has shifted from one of formal application of an inflexible

maxim against delegation to one of determining whether legislative grants of power are in fact inordinate. "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard," the Supreme Court has stated. *United States v. Chicago, M., St. P. & P. R. Co.*, 282 U.S. 311, 324 (1931). It is thus only where there are no adequate standards contained in the enabling legislation that delegations of legislative power to the Executive will be held invalid today in this country. At the same time, the validity of particular delegations is still, with us, primarily a judicial question. It is our courts who have the last word in determining whether the standards contained in a given enabling Act are adequate.

It is with regard to the question of judicial control that the French practice on delegations of authority to the administration differs from the American one. And it is in this respect that the situation in France resembles more closely that in Britain than that which prevails in the United States. It should be noted that French jurists tend to deny that there is any such resemblance between their system and that in Britain on this score. The question of delegation, asserts a recent French text on constitutional law, involves a special legal problem in countries, like France, which have a written Constitution. "In effect", declares the author, "in systems such as the English one, the absolute supremacy of Parliament, unlimited by any formal Constitution, allows Parliament to delegate to the Government all the powers which it deems necessary. In countries which have a written and rigid Constitution, on the contrary, Parliament possesses legislative authority only from the Constitution and cannot, without violating it, charge the Executive with legislating in its place."

From a practical point of view, the situation in France with regard to limitations upon the authority which may be delegated to the Executive is basically like that in Britain because of the lack in the French system of any judicial control of the validity of the laws enacted by the legislature. The restrictions placed on the action of the legislature under the French constitution are, in Dicey's famous phrase, not in reality laws, since they are not rules which in the last resort will be enforced by the courts. Their true character is that of maxims of political morality, which derive whatever strength they possess from being formally inscribed in the constitution and from the resulting support of public opinion.

The situation in France in this respect is of particular significance for Americans who are wont to criticize the system of judicial review of the constitutionality of statutes which prevails in this country. The French experience shows that a Constitution which cannot be judicially enforced contains but empty words. It is judicial review which ensures that the American Constitution is not violated and gives that instrument its practical meaning. It is the failure of the French courts to assert a review power over the constitutionality of acts of the legislature that has made the various Constitutions in France mere paper instruments and has, in effect, placed the French legislature in a position of practical supremacy not unlike that enjoyed by the British Parliament.

The doctrine against the delegation of legislative power to the Executive, which French lawyers have stated to be a basic principle of their constitutional law, has thus, like other constitutional doctrines in France, been of no more effect than a mere maxim of political morality. It has not in practice served to limit the grants of authority conferred upon the administration by the French Parliament. Nor, as we shall see, has the situation been changed by the insertion in the French Constitution of 1946 of an express prohibition against the delegation of legislative power by the Parliament. The failure of the French courts to assert a review power over the constitutionality of statutes has left the legislature as the final judge of the validity of its delegations—which means, of course, that there are, in practice, no restrictions upon the authority which may be delegated by the French legislature to the administration.

3. *Decree-Laws.* The truth of the above assertion can be best seen with reference to the most extreme type of delegation made by the French Parliament, namely, that of the authority to promulgate so-called "decree-laws."

It has already been indicated that the rule-making power of the French administration is subordinate to the legislative authority of the French Parliament. This means that an administrative rule in the French, as in the Anglo-American, system is invalid insofar as it is contrary to statute-law. But what if the legislature expressly delegates to the administration the authority by its rules to modify or amend existing statutes?

In the United States, it is probable that such an attempt by the legislature to confer the authority upon the administration to amend statutes would be held to exceed the permissible bounds of legislative delegations. As expressed by Mr. Justice Sutherland, "The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it." *Miller v. United States,* 294 U.S. 435, 440 (1935).

In Britain, on the other hand, there are no limitations to restrain Parliament from delegating the power to amend statutes. In fact, the type of delegation about which there has been the most controversy in the British system—the so-called "Henry VIII clause"—involves essentially the grant of authority to amend acts of Parliament. These clauses, in effect, have conferred power upon the Executive to modify the provisions of the relevant enabling Act so far as may appear to it to be necessary for the purposes of bringing the Act into full operation. Because of the supreme position of Parliament, the validity of such delegations has, of course, been beyond question in the British courts. This does not, however, mean that the "Henry VIII clause" has not been strongly criticized by British students, who have constantly urged that its use should be abandoned in enabling statutes. Such, indeed, was the recommendation of the Committee on Ministers' Powers, which was appointed by the Lord Chancellor in 1929 to investigate the subject of administrative law, and its suggestion has, in fact, led to the virtual disappearance of the "Henry VIII clause" from recent British legislation.

In France, as in Britain, there have not been any practical restrictions upon the delegation by the Parliament of the authority to amend statutes. Such delegations have, in fact, been made a number of times in the period between the First and Second World Wars, in connection with the authority to promulgate so-called "decree-laws." These decree-laws, like the regulations promulgated under the British "Henry-VIII clause," have as their primary characteristic the fact that they are not subject to the normally basic subordination of administrative rules to statute law. The French decree-laws, like the regulations issued under the British "Henry VIII clause," are valid even though their terms conflict with those of existing statutes.

The British type of delegation is, however, not nearly as broad as its French counterpart. The "Henry VIII clause" is intended to enable the administration to bring a defined legislative scheme into practical operation by enabling it to alter legislative provisions which may prove unworkable in practice. The power to promulgate decree-laws is not one delegated with reference to any defined statutory program. Instead, the administration is authorized to take whatever measures it deems necessary to deal with the nation's economic problems.

This can be seen with reference to the law of February 28, 1934, an illustrative statute of this type, which provided that "the Government is authorized, until June 30, 1934, notwithstanding any laws to the contrary, to take, by decrees . . ., the economic measures which the balancing of the budget demands." The decrees promulgated under this law were to be submitted to the Parliament for ratification by October 31, 1934, but were to be valid until the legislature refused to ratify.

If ever a statute provided for wholesale delegation, it was a law of this type. The French government was, in effect, given the authority to promulgate any decrees which it deemed necessary to aid in the balancing of the budget and such decrees were to have the full force and effect of law, even though they conflicted with existing statutes—hence the term "decree-laws." These decree-laws, in the words of French students, involved an extreme concentration of legislative and executive power, but such concentration was thought to be justified by the pressing need to deal with the exigencies of the economic crisis. The various French governments in the inter-war period, faced with the need to reduce administrative expenses, balance the budget, and stabilize the franc, felt that the only way these problems could be dealt with was by extended use of the administrative rule-making power. In the words of one treatise: "In this case of grave crisis requiring urgent measures which could not be adopted with the delays inherent in legislative procedures, the Parliament assumed the right to extend the administrative rule-making authority, without excepting from it the matters normally reserved for the legislature alone."

The extent of the power given to the French government by the law of February 28, 1934 can be seen from a 1937 case in which the exercise of the power was questioned. The administration had promulgated a decree under that law which reg-

ulated the dimensions, weight, and loads of vehicles using the public roads. As against the contention that such a decree had no relation to the statutory standard of "economic measures which the balancing of the budget demands," the Council of State held the decree to be valid, declaring that "The legislature intended to enable the Government to realize all reforms which might lead to a reduction in the expenses of the State . . . [and] it is established that the limitation of the dimensions, weight, and loads of vehicles allowed on the public roads will lead to a reduction in the costs of upkeep of such roads." That a law authorizing the promulgation of decrees necessary to aid in the balancing of the budget is construed as authorizing a traffic regulation of the type upheld here indicates that, in effect, the Executive is given plenary powers to take the measures it deems necessary to deal with the economic situation of the country. This, at any rate, was the view of the various French governments with regard to the authority conferred by the law of February 28, 1934, and subsequent similar laws. "It is by the hundreds," says a writer, "as is well known, that the decree-laws have appeared, notably in 1935, 1936 and 1938, the Government having dealt out, in massive doses, the remedy placed at its disposition" by the legislature.

Nor could it be validly contended in the French system, that a statute like the law of February 28, 1934 provided for an unconstitutional delegation of legislative power to the Executive. Such a contention was, in fact, made in a case decided by the Council of State in 1936, but that tribunal held that it was not competent to deal with the constitutional question. "In the actual state of French public law," the decision reads, "this contention is not one which can be raised before the judicial section of the Council of State."

The American administrative lawyer who seeks to understand the scope and effect of the French statutes authorizing the promulgation of decree-laws has a ready analogy in the Act held invalid in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). As interpreted by the Supreme Court, the National Industrial Recovery Act, like the French laws we have been considering, empowered the Executive, in the exercise of its rule making authority, to take any measures which it deemed necessary to aid in the economic recovery of the nation. Under the Recovery Act, "the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered." (*Id. at 542*) As stated by Mr. Justice Cardozo, "This is delegation running riot. No such plenitude of power is capable of transfer." (*Id. at 553*)

In the French system, such "delegation running riot" had become the normal means of dealing with economic and other emergencies by the time of the Second World War. Laws like the law of February 28, 1934, vesting plenary powers in the Government to deal by decree with the nation's economic situation, were enacted in 1935, 1937, 1938, and 1939. On the eve of the war, the French system had thus become accustomed to the existence of a legislative power in the Executive co-extensive with that possessed by the Parliament in the

economic field. It is no wonder then that the transition to the government of Vichy in 1940 was not as difficult as it might otherwise have been. "The developments already discussed", states a French text, "show us that the serious alterations made in the Constitution in July 1940 were not without their precursors." The vesting of complete legislative power in the Chief of State in 1940 was not such an innovation for a country already accustomed to confer plenary powers upon the Executive to promulgate decree-laws. After having again and again delegated its legislative powers, Parliament could, without the risk of shocking public opinion, attempt to delegate its constituent power and by this process destroy the Constitution by quasi-constitutional means.

It is true that the vesting of plenary powers in the men of Vichy was not the same thing as conferring them upon the men of the Third Republic, whose mandate in office depended upon the confidence of the nation's elected representatives. But personal confidence in the delegate is itself no answer to the question of restrictions upon delegations. "It is not your dictatorship of which I am afraid, Mr. Prime Minister," stated a legislative opponent to one of the laws conferring the authority to promulgate decree-laws upon the French government. "Other men may replace you."

4. *Decree-Laws of 1948.* The French themselves have not been slow to realize that the widespread use by the Executive of the authority to promulgate decree-laws was among the factors which facilitated the transition to a totalitarian regime in 1940. And the desire to prevent a return to such delegations running riot in the France that was to be constituted after the Liberation led to the inclusion in the Constitution of 1946 of a formal prohibition against the delegation of legislative power. "The Parliament alone may vote laws," reads Article 13 of that instrument. "It may not delegate that right." Although there is no express condemnation of the decree-law practice in this article, asserts a commentator, "such must be the meaning of its two short sentences, if weight is given, as is necessary, to the preparatory work and the discussion of the article before the Constituent Assembly. It follows from them that the members of the Assembly intended very clearly, though in a way which is unfortunately somewhat ambiguous, to condemn the decree-law practice, which was considered as one of the gravest faults of the Third Republic."

The French Constitution of 1946, however, like its predecessors, provides for no mechanism by which its provisions can be enforced. The French courts today, like those under the Third Republic, uniformly refuse to assert the authority to declare Acts of the legislature invalid even though they may conflict with the provisions of the organic instrument. Article 13 of the present French Constitution is thus, in practice, a maxim of political morality, which can be violated at will by the legislature.

That the practical situation in France has not, in fact, been changed by the express constitutional prohibition against the delegation of legislative power is shown by the enactment by the very first Parliament under the Constitution of 1946 of an enabling Act as broad as those which had

authorized the promulgation of decree-laws. The law of August 17, 1948, in effect, authorizes the executive to take, by decree, any measures deemed necessary to deal with the economic situation and, as in the case of the decree-laws, it is expressly stated that the decrees promulgated may modify or replace existing legislative texts.

The law of August 17, 1948 clearly seems to mark what has been termed an offensive return of the decree-law practice. As stated during the Parliamentary debates, "The word decree-law is not in the text, but, even without the word, it contains the reality of the decree-laws." Both during the legislative debates and since the enactment of the 1948 law, grave doubts have been expressed with regard to its constitutionality. "It is impossible to admit that Parliament could have thus delegated wholesale its legislative power without violating article 13 of the Constitution," asserts the leading contemporary work on the *droit administratif*. But there is little doubt that the return of the decree-law practice is now an accomplished fact, despite article 13 of the Constitution. "Constitutional or not," concludes one author, "the law of August 17, [1948] seems destined to be applied in a country where there is no judicial control of the constitutionality of laws and where such political control as has been provided for appears to be entirely illusory."

DEBATE ON EXAMINERS

One of the highlights of the Boston meeting was the debate on S. 1708, providing for Presidential appointment of hearing examiners, which was held on the morning of August 25, 1953. Because of the significance of the subject and the manner in which it was debated, it is felt that a summary of the principal points made by the speakers should appear in the Bulletin. This will both enable those who were unable to come to Boston to learn the substance of the arguments presented on both sides and refresh the recollections of those who were able to attend the meeting.

Mr. Robert N. Denham, former general counsel of the National Labor Relations Board, argued for the affirmative in the debate and supported the view that hearing examiners in federal agencies should be subject to direct appointment by the President. The following were the principal points made by him in his address:

1. The legislative purpose of section 11 of the Administrative Procedure Act was to set up, as nearly as possible, an independent administrative judiciary.

2. Despite this clear purpose of section 11, its administration and the manner in which it has been received by so many of our agencies have been such as completely to sabotage it. This makes it essential that we try some other method of giving to federal examiners the complete and absolute independence that they have thus far not had.

3. Examiners are still subject to the pressures brought upon them by agencies that want to impress upon them the necessity of perpetuating their philosophies. They have been wholly agents selected to carry out the policies and programs of the agencies.

4. The Civil Service Commission approached the job of choosing administrative judges with the same yardstick and the same slide-rule formula that they approached the classification of the more or less subordinate positions that has constituted the bulk of Commission work.

5. The classification concept is out of place in this field. The proper analogy is that of the District Judges. Just as they are all of the same grade, handling both simple and difficult cases, so must examiners be. Cases cannot be evaluated in advance on the score of the difficulties involved in them.

6. The examiners have a responsibility comparable to that of the District Judges. Their decisions often have a greater impact on the national economy than the average decisions of the District Courts. Because of this, the method of appointment used for judges should be used for examiners as well.

7. The danger of political pressures is not persuasive. The role of politics in the appointment of our judges has not prevented us from having a good judiciary. There is no reason why the President should depart from the same standard that he uses for the appointment of the federal judiciary when he is designating trial examiners for our administrative judiciary.

8. The same factors which minimize political pressures in judicial appointments —i.e., suggestions of Bar Associations, public opinion, etc.—will play an equal part in examiner appointments.

9. The system set up by the APA has not succeeded in getting rid of incompetent incumbent examiners.

10. The Civil Service Commission bowed to pressures in refusing to carry out the intent of section 11 of the APA. The Commission was responsible for "flunking" its job there, and that must not happen again.

Mr. Clarence A. Miller, Vice President and General Counsel, The American Short Line Railroad Association, took the position that Federal trial examiners should not be subject to Presidential appointment. In the course of his remarks he made the following points:

1. Judicial and quasi-judicial officers whose chief function is adjudication, should not be selected upon the basis of their political affiliations.

2. The high purposes of Section 11 of the Administrative Procedure Act have not been achieved and the failure is properly placed at the door of the old New Deal Civil Service Commission.

3. The proposal to have hearing examiners appointed by the President stems from the decision of the Supreme Court of the United States in the *Ramspeck Case*, 345 U.S. 128 (1953) on the theory that something was taken away from hearing examiners with respect to promotion, tenure, compensation and removal. He denied that the Ramspeck Case minimized or diminished in any way the independence of hearing examiners.

4. To make hearing examiners subject to Presidential appointment would throw the present corps of those examiners to the

political wolves and ruin the present hearing examiner system.

5. The proposal for having hearing examiners appointed by the President was considered by the Attorney General's Committee on Administrative Procedure and rejected. There has been no good reason advanced for a change in that position.

6. To subject hearing examiners to Presidential appointment would thwart the basic objectives of the Administrative Procedure Act and would impair public confidence in the administrative process.

7. To have hearing examiners appointed by the President would be to abandon the merit system which inquires of a prospective hearing examiner "what do you know," and substitutes the political inquiry of "who do you know."

8. He made the point that the new Civil Service Commission could be relied upon to improve the situation with respect to hearing examiners and at least it ought to be given the opportunity to do so.

9. President Eisenhower has frequently stated his support of the merit system and career service, and, in that light, could hardly be expected to approve a proposal for political appointment of hearing examiners.

10. A good many present hearing examiners could not muster the necessary political support to obtain Presidential appointment, so that they would be out of jobs and the public would be deprived of the benefits of their long training and experience.

11. We should preserve and improve what we have, and not change to something when we do not fully appreciate the evils of doing so.

EXAMINERS AND THE APA

(*Editor's Note:* In view of the importance of the examiner problem, illustrated by the debate between Messrs. Denham and Miller, *supra,* it is felt that an account of the examiner situation under the APA would prove useful to Section members. Since the subject is such a controversial one, it should be borne in mind that the views expressed are those of the Editor, and do not necessarily reflect those of the Section or the American Bar Association).

The securing of qualified hearing-officer personnel by federal agencies is a function which was characterized by the Attorney General's Committee on Administrative Procedure as "the heart of formal administrative adjudication. It [administrative adjudication] cannot succeed without competent and well-paid men exercising functions of responsibility and interest." (*Report F, 46*) This is clear if one bears in mind the crucial role which the hearing officer performs in the process of administrative adjudication. "With the rapid growth of administrative law in the last few decades," the Supreme Court has recently informed us, "the role of these quasi-judicial officers became increasingly significant and controversial." (*345 U.S. at 130*). As a practical matter, it is only before the hearing officer, rather than before the agency heads themselves that the private

party has had his full opportunity to present his side of the case. "These agencies have such a volume of business, including cases in which a hearing is required, that the agency heads, the members of boards or commissions, can rarely preside over hearings in which evidence is required." (*Ibid*) Their duties in this respect have been delegated to subordinate hearing officers, whose position *vis-a'-vis* the private parties appearing before them has, in many ways, been that of administrative trial judges.

Prior to the Administrative Procedure Act, as the Supreme Court has stated, "Many complaints were voiced against the actions of the hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations (345 U.S. at 131). The APA sought to deal with these complaints by setting up within each agency a group of hearing examiners, who would not be so subject to agency pressures. "Congress", to quote a 1953 decision of the Supreme Court on this point, "intended to make hearing examiners 'a special class of semi-independent subordinate hearing officers' by vesting control of their compensation, promotion and tenure in the Civil Service Commission to a much greater extent than in the case of other federal employees." (345 U.S. at 132). The intent of the Act here was to enable qualified examiners to be chosen and to permit them to maintain the independence appropriate to a quasi-judge, by freeing them from direct agency control. "On paper at least," the sponsor of the APA in the Senate tells us. "They are to be very nearly the equivalent of judges, albeit operating within the federal system of administrative justice." (*McCarran, 38 Geo. L. J. at 582*).

There can be little doubt but that the intent of the sponsors of the APA greatly to improve the calibre and position of the federal hearing officer has been largely defeated thus far by what has been aptly referred to as the "hearing examiner fiasco" under the Act. The implementation of section 11 of the APA by the constitution of a corps of competent examiners is the key to the effectiveness of the formal procedural requirements imposed by that Act. Yet the breakdown in practice of the machinery for implementing section 11 has meant that that section has not yet had much of the corrective effect intended for it.

The failure effectively to execute the provisions of section 11 of the APA must be laid directly at the door of the Federal Civil Service Commission. The "unlovely situation" (as Senator McCarran has termed it) caused by its timid and vacillating action need be only briefly described, since it has already been adequately dealt with in several published accounts. The Civil Service Commission proceeded very slowly in seeking to fulfill the legislative mandate to implement section 11—so slowly, indeed, that, though the requirements of section 11 did not take effect until June 11, 1947, a year after the enactment of the APA, when the critical date arrived, the Commission had to resort to the device of making "conditional" appointments of both incumbent examiners and new personnel to fill vacancies. The first important step which the Commission took was to issue, on June 28,

1947, Proposed Regulations for the appointment, compensation, and removal of hearing examiners, which, after hearing, were, with some changes, adopted as the Final Regulations of the Commission some three months later. The qualifications required for appointment to hearing-examiner positions under the APA were then set forth in a circular issued by the Commission. The experience requirements contained therein were intended to ensure that examiners would possess the proper qualifications to perform duties which were essentially judicial in character, though due weight was also given to specialized experience in the particular field of administrative regulation.

Despite criticisms which have since been directed against them, the regulations and qualifications thus announced by the Civil Service Commission, in the opinion of the present writer at least, constituted a good first step in the direction of the implementation of section 11 of the APA. If they had been consistently applied, it seems clear that much of the later fiasco would have been avoided. A first important step in the direction of such application was, in fact, taken by the Commission with its appointment of a Board of Examiners mainly from outside the Government to pass on the qualifications of incumbent status examiners and to conduct a competitive examination for non status incumbents and new applicants. This Board was composed of six persons: two state supreme court judges; one employee of the Civil Service Commission; and three practicing attorneys. It has been contended that the Board was drawn from too narrow a base, the majority of its members having been closely connected with the American Bar Association. One wonders whether this, of itself, is necessarily a valid objection. The Board was appointed from outside the Government on the theory that those connected with the administration would not possess the non-partisan outlook needed if hearing examiner personnel was to be thoroughly screened. If the Board was to be chosen from outside the Government, it is difficult to see how the choice could properly be made from outside the Bench or Bar. It may be true that lawyers connected with the American Bar Association start with a certain point of view in the field of administrative law. But was it not that point of view that led to the Administrative Procedure Act itself and if so, is it unreasonable to expect that those sharing it would be qualified to give effect to one of the key provisions of that statute?

The failure of the Civil Service Commission adequately to implement section 11 of the APA stems not from its appointment of the Board of Examiners but from its supineness in supporting the Board in the work it was chosen to do. The Board went ahead, in accordance with its directive from the Commission, and examined the qualifications of incumbent examiners. When the results of its inquiries were announced, in March 1949, a surprisingly high number—25%—of those rated by the Board were found disqualified by it for appointment under the Procedure Act. And then the political storm descended. As a practical matter, the Board's action meant that the 54 examiners who were found disqualified would have to lose their jobs, if the Board's recommendations were followed. They, not

unnaturally, brought to bear every form of pressure available to them to ensure that such a result would not ensue. The details of such pressures—administrative, legislative, and even judicial—need not be recounted here. Suffice it to say that they ultimately led the Civil Service Commission to reject the recommendations of the Board which it itself had appointed. The Board of Examiners resigned and the incumbent examiners, both those who had been found to be qualified by the Board and those who had not, were found by the Commission to be qualified for appointments under the APA.

One who is familiar with the unsavory story just outlined cannot help but conclude, with the sponsor in the Senate of the Procedure Act, that "It would have been far better if the Commission had 'covered in' all *incumbents*, thereby avoiding controversy it could not cope with, and had really used its position to make sure of a superior panel of new personnel to fill *vacancies*." (*McCarran, 38 Geo. L. J. at 582-3*) The one thing that is clear is that, if the pre-existing situation with regard to hearing officer personnel in the federal administration was unsatisfactory (and both the pre-APA complaints already referred to and the high number found to be unqualified by the Board of Examiners indicate that it was), it has not been at all improved by section 11 of the 1946 Act. For, as has been shown, those appointed under section 11 are, in most cases, the very same people who had held hearing officer positions prior to the APA. All that can be hoped for now under section 11 is future improvement in the situation by ensuring selection of proper personnel as examiner vacancies occur. This can be done if a competent examining officer or body is chosen, either within or outside the Civil Service Commission, with the responsibility of seeing that this is done. No steps along this line have, however, as yet been taken. If as Senator McCarran has stated, there is little promise of any betterment under the present civil service administration, it may well be, as is provided for in S. 1708, introduced by him that "something different must be devised, perhaps in the form of Presidential appointment with Senate confirmation unless examiners are to remain 'inferior Officers' as section 2 of article II of the Constitution quaintly but aptly puts it." (*Ibid*).

As far as the draftsmen of the APA were concerned, ensuring the appointment of competent examiners was to resolve only part of the hearing-officer problem. Just as important to them were the provisions of section 11 respecting the independence and tenure of examiners, which were intended, in the words of Senator McCarran, to "make examiners a separate and independent corps of hearing officers worthy of judicial traditions." We have already seen that the provisions of section 11 looking to the appointment of qualified examiners have been given anything but the effect which they were intended to have. Have that section's provisions seeking to safeguard the independence of examiners fared any better?

With regard to these provisions, too, it is impossible to conclude that the Civil Service Commission has really sought to give effect to the intention of the drafts-

men of section 11 of the Procedure Act. Its regulations on the subject provided, with regard to the key question of the promotion of examiners, that the agency concerned would be permitted to select the examiner to be promoted subject to the retroactive approval of the Commission. This so clearly violated the intent of the 1946 Act that examiners should be in a position of independence that the promotion regulation was pronounced invalid in an opinion of the Attorney General at the beginning of 1951. In September, 1951, the Commission promulgated revised regulations regarding the appointment, compensation, and removal of hearing examiners. These, too, were, however, challenged as invalid, and this challenge resulted in the case of *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128 (1953).

The action in that case was brought by an unincorporated association of federal examiners and a number of individual examiners against the members of the Civil Service Commission and the National Labor Relations Board for a declaratory judgment that the Commission's hearing-examiner regulations were invalid and for an injunction against their enforcement. Although both the district court and the Court of Appeals held that the regulations were contrary to the APA, the Supreme Court reversed, holding that the Commission had not failed to conform to the statute and carry out the purpose and intent of Congress. One of the principle objections raised by petitioners to the Commission's regulations was directed to the fact that they set up a classification of hearing examiners into grades, with salaries appropriate to each grade, in each federal agency using examiners. This classification ranged from just one grade in several agencies to five grades in two agencies. The Supreme Court held that, in so classifying examiners, the Commission was doing just what Congress directed it to do, for section 11 of the Procedure Act expressly directs that "Examiners shall receive compensation . . . in accordance with the Classification Act of 1923, as amended."

The lower courts had been particularly critical of the specifications used by the Commission in its regulations to classify the examiners, the district court characterizing them as "nebulous and subjective." To classify the positions into the different grades, the Commission used such specifications as to job content as "moderately difficult and important", "difficult and important," "unusually difficult and important," exceedingly difficult and important," and "exceptionally difficult and important." According to the Supreme Court, the specifications used in this case "of necessity must be subjective. They are not based so much on evidence as on judgment. It is a discriminating judgment and one Congress committed to the experience and expertise of the Civil Service Commission, not the courts. The specifications evidently had practical content and meaning to Congress, as it repeatedly used similar phrases to describe relative methods in . . . the Classification Act." (*345 U.S. at 137*).

It should be noted that, under the regulations of the Commission, the classification of examiners within each agency determined not only the compensation which examiners were to receive but also the type of work

which they were to perform. And, despite the provision of section 11 of the APA requiring examiners to be assigned to cases in rotation so far as practicable, the relevant regulation provided for assignment of examiners in rotation to "cases of the level of difficulty and importance that are normally assigned to positions of the salary grade they hold." Though section 11 seems to intend a mechanical rotation among all the examiners in an agency, the Supreme Court held that, in view of the classification of examiners by the Commission, the rotation could for pratcical reasons be adjusted to the classifications. This was an allowable judgment by the Commission, said the Court, as to what was practicable.

Even if one agrees with the decision of the Court that these regulations are within the power of the Civil Service Commission, it is to be doubted whether he will become wholly convinced that they are truly calculated to carry out the intent of the framers of the APA concerning the status of hearing examiners. And even with regard to the bare question of the legality of the regulations, it is significant that Chief Judge Laws in the district court, the majority of the Court of Appeals, and three Justices of the Supreme Court were of the opinion that the Commission had acted ultra vires section 11 of the 1946 Act. "I do not agree with the court", asserted Mr. Justice Black who delivered the dissenting opinion in the highest Court, "that the Classification Act of 1923 or any other act of Congress authorizes the distinctions here made between examiners. In fact, the Administrative Procedure Act appears to contemplate that all examiners employed by a particular agency stand on equal footing in regard to service and pay. A central objective was to prevent agency heads from using powers over assignments to influence cases. Unlimited discretion in assignment would lead to subservient examiners, it was thought. But the effect of the Civil Service classifications is to restore the unlimited discretion existing before passage of the Administrative Procedure Act." (*345 U.S. at 144-45*).

According to Justice Black, the distinctions depended upon to support the different classifications of examiners are so nebulous that the agency head is left practically free to select any examiner he chooses for any case he chooses. The specifications used by the Civil Service Commission to classify examiners, which have already been touched upon, are seen to be so subjective as to leave the work of the examiners entirely within agency discretion which is, of course, exactly the opposite of what the framers of the APA intended. "I think," asserted Justice Black at the end of his opinion, "all these conceptualistic distinctions mean is that the congressional command for a nonagency controlled rotation of cases is buried under words." (*Id. at 145*).

One familiar with the history of the operation in practice of the examiner system provided for under sections 7 and 11 of the Procedure Act would, indeed, have to shut his eyes to reality for him to conclude that the provisions of the Act have been implemented in accordance with the intent of their draftsmen. In view of the way in which the Civil Service Commission has mishandled the task delegated to it

under section 11 of the 1946 Act, measures must be taken to improve the situation. This may go as far as the step provided for in S. 1708. This would go far toward meeting the intent expressed by the Senatorial sponsor of the APA of having examiners "be very nearly the equivalent of judges." If this step is felt to be too extreme, and the job is left with the Civil Service Commission, that agency should delegate the job of administering section 11 of the Procedure Act to a high official in the Commission, specially recruited for the purpose, of suitable qualifications and prestige.

Better perhaps than either of these alternatives is for the task of administering section 11 to be taken away from the Civil Service Commission and vested in an independent Office of Administrative Procedure, comparable in dignity and responsibility to the Administrative Office of the United States Courts. It is high time that such an Office, whose establishment was strongly urged by the entire Attorney General's Committee on Administrative Procedure in 1941, were set up. It would examine critically the practices and procedures of the federal administrative process and collect and collate information concerning them. An Office of this type has been established in the State of California and its work thus far clearly appears to justify the extension of the experiment to the federal field. The California Office is responsible for the hearing officer personnel of the agencies of that State, and no complaints have been recorded with regard to its performance of this task. In view of the almost incredible way in which the Federal Civil Service Commission has, as we have seen, botched up the examiner situation, it would be desirable to transfer the Commission's functions in this respect to the new Office, if and when it is created.

APA AND PRECLUSION OF REVIEW

Perhaps the most significant limitation on the right of review afforded by section 10 of the Administrative Procedure Act is that contained in the introductory clause of that section, which limits the availability of review "so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion."

It appears evident that judicial review is not precluded within the meaning of the first part of this clause simply because there is no statutory provision for review in the given case. As it was expressed by the House Judiciary Committee, "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." (*APA: Legislative History*, 275).

That review is available under section 10 of the APA even in the absence of express provision therefor in the relevant enabling statute is shown by a 1951 decision of the Court of Appeals for the District of Columbia. The court there held that a determination by the National Mediation Board that it had no jurisdiction of a dispute between an airline and certain

of its employees because its competence was limited to the continental limits of the United States was reviewable by an action in the district court. The purpose of section 10 of the APA, said the court, "is to afford review unless the matter has been committed to agency discretion . . . or unless Congress has otherwise decided." And the mere failure on the part of Congress expressly to provide for review did not indicate a legislative decision to bar review. "Since it is not a question of the type previously held unreviewable, and since there is no explicitness in the Railway Labor Act or indication in its history of a Congressional intent to leave it exclusively to Board determination, the provisions of §10 of the Administrative Procedure Act for court review take hold of it." *Air Line Dispatchers Ass'n v. Nat'l Mediation Board,* 189 F. 2d 685, 689 (D.C. Cir. 1951).

What happens, however, when there is an express statutory provision which appears to preclude review? It should be noted that even an express statutory provision for administrative finality has normally been held, prior to the APA, not to be enough to override the basic policy of our law in favor of review. The mere fact that the administrative action is declared by the legislature to be "final" or "conclusive" has usually not been sufficient to bar all judicial review. The courts have tended to treat such provisions for finality much as they have treated cases where the relevant statute is silent on the question of review. In both cases, the courts have tended to refuse to find a legislative intent to preclude review. "Mere failure to provide for judicial intervention", as Mr. Justice Clark has recently put it, "is not conclusive; neither is the presence of language which appears to bar it." *Heikkila v. Barber,* 345 U.S. 229, 233 (1953).

The leading Supreme Court decision illustrating the judicial approach to statutory provisions for administrative finality is *Estep v. United States.* 327 U.S. 114 (1946). The statute there declared that the decisions of local draft boards were to be "final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe." Despite this provision, the Court held that a local board's induction order was not placed beyond judicial control. Mr. Justice Douglas emphasized the fact that the "statute makes no provisions for judicial review" and went on to state the usual rule in cases where the statute is silent on review, i.e., that legislative silence alone is not enough to bar review. "Why the Court emphasized silence of Congress in the face of the words 'shall be final' is difficult to understand", states one commentator. (*Davis, Administrative Law, 835*). Yet the decision itself clearly stands for the proposition that, in the normal case, a provision for administrative finality does not mean that all judicial review is precluded. "It is only orders "within their respective jurisdictions' that are made final." (*327 U.S. at 120*). Mr. Justice Douglas asserted in his *Estep* opinion and the jurisdictional question is a judicial question. To hold otherwise would be to impute an intent to the legislature to depart drastically from our normal tradition of judicial control of legality, in a case where the legislative intent has not been expressed unequivocally. "We cannot read-

ily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards 'final'." (*Id. at 122*).

The applicability of the principle of the *Estep* case, under which mere provisions for administrative finality are normally not enough to preclude review, to the introductory clause of section 10 of the APA has been at issue in cases involving the deportation of aliens.

Under section 19 of the Immigration Act of 1917, the decision of the Attorney General with regard to the deportation of an alien "shall be final." Is this a case of statutory preclusion of review so that section 10 of the APA does not apply? Our analysis above indicates that it is not, for the provision for finality alone should not be enough to bar review. This view is confirmed by *United States ex rel. Trinler v. Carusi,* 166 F.2d 457 (3d Cir. 1948), where the Court of Appeals for the Third Circuit held that the Immigration Act did not preclude review of deportation proceedings within the meaning of the introductory clause of section 10 of the APA. Despite the provision that the decision of the Attorney General "shall be final", "it is perfectly clear that it is not final in the sense that courts cannot do anything about it" (*Id. at 460*), for it has long been settled that the legality of deportation orders can be tested in habeas corpus proceedings. In the exercise of their authority to issue writs of habeas corpus, the courts may inquire whether the Attorney General has exceeded his statutory authority or acted contrary to law or the Constitution. "While it might look as though judicial review were precluded by the giving to the deportation order the air of Finality, in practice such finality never existed because of the availability of habeas corpus. The fact that review has been judge-made out of the concept of due process does not make it any less a qualification of the statute than if the legislators had put the provision in it when the statute was first drawn." (*Id. at 461*).

Under the *Trinler* case, a deportation proceeding does not come within the first exception to section 10 of the APA. Since that is true, the court held that the deportation order at issue could be reviewed directly under section 10. Habeas corpus was thus no longer held to be the exclusive means of obtaining review of deportation orders, as it was prior to the APA. "What we are here deciding is that the Act did enlarge the rights of people against whom deportation orders have been issued and that they are now entitled to judicial review after the issuing of a deportation order." *Kristensen v. McGrath,* 179 F.2d 796, 798 (D.C. Cir. 1949).

The decision of the Court in the *Trinler* case, under which a statutory declaration of finality, such as that contained in the Immigration Act, which has not precluded review by way of habeas corpus for a considerable number of years, does not qualify as a bar to review under section 10 of the APA, has been followed in a number of other federal cases, notably in two opinions, recently characterized by Mr. Justice Frankfurter as "careful" (*345 U.S. at 238*) by the Courts of Appeals for the Sixth Circuit (*Prince v. Commissioner,* 185 F.2d 578) and the District of Columbia. (*Kristensen v. McGrath,* 179 F.2d 796). The

latter court's decision in 1949 in *Kristensen v. McGrath* appeared especially to have settled the law in favor of the *Trinler* view, particularly after its holding that an alien against whom a deportation order had been issued could bring an action for a declaratory judgment had been affirmed by a unanimous Supreme Court, though without mention of the APA. *340 U.S. 162 (1950).*

In *Heikkila v. Barber,* 345 U.S. 229, however, decided by it in March, 1953, the Supreme Court has expressly repudiated the holding of the *Trinler* decision and the cases following it. In that case the Court held that an alien could not challenge the legality of a deportation order in a declaratory judgment proceeding, asserting that such order could be attacked only by habeas corpus, as had been the case prior to the APA. The alien had, as in the cases discussed above, relied upon section 10 of the APA as giving him a right of review, but the Court declared that the Immigration Act provision for administrative finality in deportation cases came within the introductory clause of section 10. "Clearer evidence," stated Mr. Justice Clark, "that for present purposes the Immigration Act of 1917 is a statute precluding judicial review would be hard to imagine. Whatever view be taken as to the breadth of §10 of the Administrative Procedure Act, the first exception to that section applies to the case before us. The result is that appellant's rights were not enlarged by that Act. Now, as before, he may attack a deportation order only by habeas corpus." (*Id. at 235*).

The Court's decision in the *Heikkila* case appears to be as unsatisfactory as any which it has rendered in the field of administrative law in recent years. For the Court to hold that a provision for finality like that in the Immigration Act precludes review within the meaning of the introductory language at the beginning of section 10 of the APA is for it to ignore both the background of provisions for administrative conclusiveness in our law and the actual facts with regard to the availability of review under the Immigration Act. The Court, as Mr. Justice Frankfurter said, in a strong dissenting opinion, "gives the phrase "judicial review" in §10 a technical content and thereby disregards the vital fact that although §19 of the Immigration Act of 1917 . . . makes the decisions of the Attorney General "final," they are not finally final. As the hundreds of cases in the lower courts demonstrate, the Attorney General's actions are voluminously challenged and frequently set aside . . . the decisive fact is that the findings of the Attorney General are subject to challenge in the courts and from time to time are upset, whatever the formulas may be by which what he has finally done is undone." (*Id. at 238-39*).

Nor should it be thought that the point at issue in the *Heikkila* case is one which is devoid of practical significance. In reality, the question of the availability of review under the APA is of great consequence to an alien against whom a deportation order is issued. Prior to the APA, review in such cases could be obtained only by means of habeas corpus. Before the writ could be issued, it was necessary for the alien to be in the custody of the Attorney General. The person about to be deported was thus in a position where he was

required by the order of the Attorney General to wind up his affairs, to bid last farewell to his family and friends and to submit himself to physical deportation before he could seek any relief or any review of what the Attorney General had determined to be his rights under the immigration laws of the United States. If section 10 of the APA were applicable, the alien could avoid having to be placed in this undesirable position before being able to obtain judicial relief. "The point is legally narrow but practically important. It means that one against whom a deportation order is outstanding but not executed, may at once move, by means of a declaratory judgment, to challenge the administrative process insofar as the substantive law pertaining to deportation permits challenge." (*Id. at 240*).

Fortunately, a more recent decision of the Court of Appeals for District of Columbia indicates that the practical significance of the *Heikkila* case, which has just been discussed, is limited to cases arising under the Immigration Act of 1917. Since that statute has been superseded by the Immigration and Nationality Act of 1952, under whose proviisons deportation proceedings are now conducted, the *Heikkila* case loses its practical import, unless its holding is applicable to deportations under the 1952 Act. And, according to the Court of Appeals decision referred to, the 1952 law, far from adopting the *Heikkila* view that deportation orders may be judicially challenged only by habeas corpus, was expressly intended to make review under section 10 of the APA available in such cases. The court relied in large part upon the legislative history of the 1952 Act, and especially the statement of Senator McCarran, its sponsor in the Senate, that "The Administrative Procedure Act is made applicable to the bill." *Rubinstein v. Brownell,* — F. 2d — (D.C. Cir. 1953).

If the Court of Appeals is correct in its decision that *Heikkila v. Barber* does not apply to deportations under the Immigration Act of 1952, the undesirable consequences of that case will be all but done away with in practice. Yet, even if that is true, the Heikkila case still remains important because of what it tells us about the attitude of the highest Court toward the APA. Just as the *Wong Yang Sung* case (*339 U.S. 33 (1950)*) is significant because of its indication of an amicable approach on the part of the Court to the APA, so *Heikkila v. Barber* remains of moment for its suggestion of a change in the judicial mood. As Justice Frankfurter stated in his *Heikkila* dissent, the Court of Appeals decisions repudiated by the Court were based on the view that the APA "should be treated as a far-reaching remedial measure, affording ready access to courts for those who claim that the administrative process, once it has come to rest, has disregarded judicially enforceable rights." (*345 U.S. at 238*) In straining as it did to reach its decision in the Heikkila case the Supreme Court has renounced this judicial attitude of hospitality, insofar as the availability of review under the APA is concerned. All that the Court itself said in its *Wong Yang Sung* opinion about the proper judicial reception of the APA would appear to constitute the best criticism of the Court's attitude in the *Heikkila* case. It is as an indi-

cation of the apparent recession of the Court from its *Wong Yang Sung* approach, indeed, that the *Heikkila* case is of primary importance.

OTHER SUPREME COURT CASES

Right to be heard.—Shaughnessy v. *United States ex rel. Mezei,* 345 U.S. 206 (1953), involved an alien immigrant excluded from the United States on security grounds but stranded on Ellis Island because other countries would not take him back. The alien had been a resident of this country from 1923 to 1948, when he left on a visit to Europe. On returning in 1950, he was ordered excluded without a hearing, on the "basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest." The Court, in a five-to-four decision, held that, since this was an ordinary exclusion proceeding, the alien could be barred from entry without a hearing. The case thus turns upon the well-established rule that entry into the country is a mere "privilege" which can be granted or denied upon any terms imposed by the Congress. Nor does one seeking a "privilege" have any procedural rights except those granted him by statute or regulations. The entering alien must be sharply distinguished from one whom the government seeks to deport. The latter has a "right" to remain in the United States and can therefore be ordered deported only after proceedings conforming to traditional standards of fairness encompassed in due process of law.

Even if one accepts the established distinction between exclusion and deportation cases, there is room for some uneasiness about the Court's holding. Petitioner here was not the ordinary alien seeking entry to this country. He had been a resident for twenty-five years and had left on what he had expected would be a temporary visit abroad. Upon his return, he was held for two years a prisoner on Ellis Island without charge or conviction for any crime. According to Justice Clarke, who delivered the Court's opinion, these factors do not make any difference to the decision of the case. "Neither respondent's harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding." (213).

It should be noted that, earlier this year, in *Kwong Hai Chew v. Colding,* 344 U.S. 590 (1953), the Court had held that a resident alien seaman who was temporarily absent upon a voyage to foreign ports could not, upon his return, be deprived of his constitutional right to be heard. His status was, in effect, assimilated by the Court to that of continuously present alien residents entitled to hearings before they could be deported. The instant case, said the Court, differs from the situation in the *Chew* case. Here, there was a clear break in the alien's continuous residence. In such circumstances, the alien is held to be assimilated to the status of only an entrant alien. That being so, the Attorney General may lawfully exclude him without any hearing. Not need he disclose the evidence upon which that determination rests.

The Court's attempt to assimilate the present case to that of the ordinary entering alien was sharply rejected by the four dissenting Justices. Exclusion of an alien

without judicial process, declared Justice Jackson, does not deny due process when it can be accomplished merely by turning him back on land or returning him by sea. But when indefinite confinement becomes the means of enforcing exclusion, due process requires that the alien be informed of its grounds and have a fair chance to overcome them.

Ex parte evidence.—The basic principle of exclusiveness of the record was at issue in *United States v. Nugent,* 346 U.S. 1 (1953). It involved an appeal by a conscientious objector from his local draft board's denial of his claim for exemption from service. Under the statute, such appeals are referred by the appeal board to the Department of Justice for its recommendation. The Department is required to hold a "hearing" before acting. The Department, in performing its functions under this law, has used the FBI to investigate each appealing registrant's case. A hearing is then held before a designated hearing officer. The registrant is permitted to appear and to bring an advisor and witnesses. He is entitled to be instructed as to the general nature and character of any unfavorable evidence developed by the Department's investigation. But he is not permitted to see the FBI report, nor is he informed of the names of persons interviewed by the investigators.

The Court of Appeals held that the procedure just outlined violated the registrant's right to be heard under the Selective Service Act. The Supreme Court disagreed, asserting that the statutory requirement of a "hearing" was satisfied when the registrant was accorded an opportunity to speak his piece before an impartial hearing officer, when he was permitted to produce all relevant evidence in his own behalf, and was at the same time supplied with a resume of any adverse evidence in the investigator's report.

There appears to be little doubt but that, in the normal case where the private individual has a right to be heard prior to administrative action that adversely affects him, the basic principle is that of exclusiveness of the record. If the agency bases its decision upon material not contained in the record, its action will be set aside. This is a fundamental principle, for the right to a hearing would itself be of little value if the agency could completely disregard the record and base its decision instead upon *ex parte* evidence. Why is it that this normal rule does not apply in the instant case? According to the Chief Justice the reason is that the word "hearing" used in the Selective Service Act does not have the meaning that it does in other administrative law cases. The word here does not comprehend the formal and litigious procedures which it normally does. Instead, the word takes its meaning in this instance from an analysis of the precise function which Congress has imposed upon the Department of Justice.

But what is it that makes the Department's function here so different from that normally met with in our administrative law? The statute places upon the Department the duty of determining whether the facts of his case place the registrant within the statutory concept of "conscientious objector." This would seem to be the very essence of administrative adjudicatory au-

thority, of the type now vested in innumerable federal agencies. The Court asserts that this is not true because the duty to classify rests, not on the Department of Justice, but on the appeal board. It is, however, difficult to see how the fact that an agency does not make the determinative decision in a case changes the nature of the function it is exercising. And this is especially true where, as in this case, the recommendation of the Department of Justice is bound to weigh so heavily with the deciding agency.

As is always the case where it rejects the individual's claim to an adversary hearing, the Court relied upon *Norwegian Nitrogen Products Co. v. United States,* 288 U.S. 294 (1933). Yet that case does not support the Court's decision. It involved the action of the Tariff Commission prior to an increase by the President of a tariff rate under the flexible tariff provisions of the Tariff Act of 1922. Its action was but a stage in the executive performance of a function clearly legislative in nature—i.e., the increase of a tariff rate. It is well recognized that there is no constitutional right to be heard prior to most agency exercises of legislative authority and, even if a statute requires a hearing, unless the statute expressly says so, the hearing need not be the formal adversary type required prior to agency adjudications. That is all that the *Norwegian Nitrogen* case stands for. Its rule is inapplicable to a case like the instant one where the agency action at issue was a stage in the performance of an adjudicatory function. It is most unfortunate that Justice Cardozo's masterly opinion in *Norwegian Nitrogen* has been used in a manner never intended by its author. All he sought to show was that the hearing required by Congress in connection with exercises of the tariff-fixing function (one legislative in nature) need not be, unless Congress specifies otherwise, of the formal adversary type. But the Court, as in the instant case, has used Justice Cardozo's opinion to support it whenever it has held that a full hearing was not required—a use that involves an unwarranted extension of Justice Cardozo's reasoning.

Findings—The need for an agency adequately to articulate the basis of its action is stressed in *Automatic Canteen Co. v. FTC,* 346 U.S. 61 (1953). The Court should have a more solid basis than an unexplained conclusion by the agency before it should confirm its action, Justice Frankfurter declares in his opinion. "While this Court ought scrupulously to abstain from requiring of the Commission particularization in its findings so exacting as to make this Court in effect a court of review on the facts, it is no less important, since we are charged with the duty of reviewing the correctness of the standards which the Commission applies and the essential fairness of the mode by which it reaches its conclusions, that the Commission do not shelter behind uncritical generalities or such looseness of expression as to make it essentially impossible for us to determine what really lay behind the conclusions which we are to review." (81). It is particularly significant that the Court has seen fit to censure the most noteworthy violator of the findings requirement. Criticisms have been directed against the skeleton-like nature of FTC orders for many years, but neither they nor

the provisions of section 8(b) of the APA have induced the Commission to improve its practices in this respect. Perhaps the strictures of the nation's highest tribunal will have a more telling effect.

Standing.—One of the most sharply criticized of Supreme Court administrative-law doctrines is that laid down in cases like *City of Atlanta v. Ickes,* 308 U.S. 517 (1939), denying the standing of a consumer to seek review of an administrative order regulating a product or service purchased by him. Though recent cases in the lower courts (e.g., *National Coal Association v. Federal Power Commission,* 191 F. 2d 462 (App. D.C. 1951) have been showing less hesitancy in upholding the standing of consumers, there has as yet been no express indication by our highest Court of a change in its jurisprudence. That is why a case like *Chapman v. Federal Power Commission,* 345 U.S. 153 (1953), is of significance to a student of the Supreme Court. In it, the Court, according to the opinion of Justice Frankfurter, expressly held that two consumer organizations had standing to challenge an FPC order. Differences of view, however, precluded a single opinion of the Court on the point. Setting out the divergent grounds in support of standing would not, in the Court's view, further clarification of this complicated specialty of federal jurisdiction.

It cannot be denied that to have no opinion on an issue is even more unsatisfactory than the skeleton-like opinions which are all too often coming to be rendered by the present Court. At the same time, we do have the express holding of the Court in favor of standing. It clearly appears to foreshadow a liberalization of that tribunal's harsh doctrine on the standing of consumers.

Review of expertise.—FCC v. RCA Communications, 346 U.S. 86 (1953), involved review of an order granting an application for modification of a radio-telegraph carrier license so as to permit the carrier to maintain direct radio telegraph circuits between the United States and certain foreign countries in competition with another carrier's existing radio-telegraph facilities. The Commission, in reaching its conclusion that duplicating authorizations were in the public interest where competition was reasonably feasible, had relied upon what it felt was a national policy in favor of free competition. In its view, the maintenance of competition was in itself a sufficient goal of federal communications policy so as to make it in the public interest to authorize a license merely because competition was reasonably feasible.

In his opinion, Justice Frankfurter places emphasis upon the fact the Commission did not rely upon its own experience in concluding that competition here was desirable. It seems to have relied almost entirely on its interpretation of national policy. Since the Commission professed to dispose of the case merely upon its view of a principle which it derived from the statute, and did not base its conclusion on matters within its own special competence, the opinion goes on, it is for the Court to determine what the governing principle is. And, says the Court, it is no longer true that there is an unqualified national policy favoring competition. It is therefore improper for the FCC to suppose that the standard it has

adopted is to be derived without more from a national policy defined by legislation and by the courts. On the other hand, had the Commission clearly indicated that it relied on its own evaluation of the needs of the industry rather than on what it deemed a national policy, its order would have a different foundation. The case must consequently be remanded to the Commission for its reconsideration.

The instant decision is in many ways comparable to the famous first *Chenery* case, 318 U.S. 80 (1943). There, too, the Court, through Justice Frankfurter, found that the agency action was based on an incorrect assessment of what the agency thought to be an established legal principle, rather than on its own *expertise*. And the case was remanded to the agency for a decision based on its special administrative competence. The only difficulty with this sort of thing is that it involves needless duplication of both the administrative and judicial process. In *Chenery*, the agency took the hint extended by the Court and reissued its original decision, but, this time, expressly relied upon its *expertise* to support its conclusions. And it seems reasonably certain that the same thing will happen upon remand in the instant case. There would certainly appear to be a better way of handling these cases, which, at best, take an unconscionably long time, than by marching them twice through the agencies and the courts. Truly, as Justice Frankfurter himself once aptly expressed it, "this danger if not likelihood of thus marching the king's men up the hill and then marching them down again seems to me a mode of judicial administration to which I cannot yield concurrence. *City of Yonkers v. United States*, 320 U.S. 685, 694 (1944).

Constitutional fact.—The ghost of *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920), supposedly laid to rest over a decade ago, continues still to haunt litigants and judges in the federal courts. In *Baltimore & O.R. Co. v. United States*, 345 U.S. 146 (1953), the appellant railroads brought suit in the district court to set aside an ICC rate order, which prescribed maximum carload rates for carrying certain kinds of fresh vegetables. The rates were charged to be "confiscatory" and therefore in violation of the due process clause. The basis for this charge was an allegation that if put in effect the rates would produce less money than it would cost the railroads to carry the particular vegetables covered by each rate. The majority of the Court held, however, that so long as rates as a whole afford railroads just compensation for their over-all services to the public the due process clause should not be construed as a bar to the fixing of noncompensatory rates for carrying some commodities when the public interest is thereby served.

In the dissenting opinion of Justice Douglas, concurred in by the Chief Justice, there is a clear implication that there may still be room for the *Ben Avon* approach in the federal courts. According to the dissent, litigants are entitled to rely on the rule of *Baltimore & Ohio R. Co. v. United States*, 298 U.S. 349 (1936), until and unless it is overruled. That case held that a carrier was entitled to raise the issue of confiscation upon review of an ICC order, even

though it had not tendered the issue in the hearings before the Commission but only on a petition for reconsideration after the order was issued. The district court therefore erred when it ruled that evidence bearing on the issue of confiscation was inadmissible on review because it had been tendered in the hearings before the Commission. And, says Justice Douglas, though the Court does not expressly decide that issue, its opinion assumes that the tender of proof on the issue of confiscation was timely.

If Justice Douglas is correct, what is this case but a revival, in new guise, of the *Ben Avon* doctrine? If evidence upon the confiscation issue is admissible in the review proceeding, it means that the court must decide that issue *de novo* on its independent judgment, for, since the issue was not raised at the agency hearings, the court cannot limit its decision on the issue to review of an administrative finding upon it. It is to be regretted that the opinion of the Court did not even see fit to touch upon this important question. Certainly, the time is ripe for a clear indication by the highest tribunal of just where *Ben Avon* and the implications flowing from it stand today.

Tort Liability. — Dalehite v. United States, 346 U.S. 15 (1953), indicates that the doctrine of sovereign immunity is still a most important one despite its supposed elimination by the Federal Tort Claims Act of 1946. The *Dalehite* case involved an action against the United States for the death of plaintiffs' husband and father, respectively, as the result of an explosion of ammonium nitrate fertilizer stored in vessels in a Texas harbor. The fertilizer was produced by the Government and was loaded aboard a French vessel to be transported to Europe as part of a Government program to ease the shortage of fertilizer abroad. The action was based on the Tort Claims Act, plaintiffs relying on the Government's participation in the manufacture and transportation of a dangerous material and alleging negligence on the part of the federal officials and employees involved in the production and transportation of the material.

The Supreme Court, in a four-to-three decision, held that the United States was not liable. The Tort Claims Act expressly excepts from its operation acts or omissions of government officers exercising due care in carrying out statutes or regulations, whether they be valid or not, and acts of discretion by government employees in the performance of their duties whether or not the discretion involved be abused. The present case, said the Court, involved the exercise of discretionary authority. And, in such a case, it makes no difference whether there was negligence or not. The exercise of discretion could not be abused without negligence or a wrongful act. The exception in the statute applies whenever the act causing damage involves the discretion of the executive or the administrator to act according to one's judgment of the best course. And it seeks to preclude actions for abuse of discretionary authority whether or not negligence is alleged to have been involved. *Compare Taylor v. Glotfelty,* 201 F.2d 51 (6th Cir. 1952).

Even if one agrees that the exception in the Tort Claims Act of discretionary acts

is well taken, it does not follow that the United States should not be liable in the instant case. As the dissenting Justices point out, it seems unjust, as a starting point, that the damage should fall entirely on the innocent victims of this man-made disaster. The disaster was caused by forces set in motion by the Government, completely controlled or controllable by it. Its causative factors were wholly beyond the knowledge or control of the victims. Yet it is they alone who must bear the burden of damage to which they were utterly incapable of contributing.

It is one thing, say the dissenters, to hold that the Act's exemption applies to decisions taken at Cabinet-level or at other important levels of the administrative hierarchy. It is, however, quite another thing to say that the Act intends to exempt negligent acts, no matter by whom performed, provided they are done pursuant to an original discretionary decision made by one vested with policy-determining functions. The Government's negligence here, concludes the dissenting opinion, was not in policy decisions of a regulatory or governmental nature, but involved actions akin to those of a private manufacturor, contractor, or shipper. In such circumstances, the Government should be held liable on the same basis as a private individual would be. "Surely a statute so long debated," asserts Justice Jackson, "was meant to embrace more than traffic accidents. If not, the ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted; it has been amended to read, 'The King can do only little wrongs'." (60).

Under a decision like that in the *Dalehite* case, the exception in the Tort Claims Act of acts done pursuant to statute or regulation and those involving discretion tends largely to swallow the waiver of immunity made by the Act. If one bears in mind the type of case in which private individuals are damaged by acts of the administration, one will realize that the Government still enjoys immunity for the most important kinds of administrative action. Only where the officer whose act has caused the injury has been negligent, in circumstances in which a private employer would be liable if the officer were his employee, is the Government liable under the federal law. In the absence of negligence the Government is still not liable, provided only that the act causing the damage was done in execution of a statute or regulation or that the administrative function at issue involved the exercise of discretionary authority. And it matters little that the law or regulation itself is invalid or that the delegated discretionary power has been abused.

This exception has the effect of leaving the Government irresponsible in most cases in which the act causing the damage is not committed by a negligent public officer, for it is only in the rare case that the officer has not acted in the execution of a statute or regulation or in the exercise of his discretionary powers. And if discretionary powers are involved, the *Dalehite* case shows that recovery against the State cannot be had even though the act causing the damage was done negligently.

It is particularly important to note that the exception under consideration has the

effect of leaving the private individual without a remedy under the Tort Claims Act where he has suffered damage from an illegal administrative act. Even if the act causing the injury were *ultra vires*, the exception to the principle of Government liability is operative, provided only that the act was performed in application of a statute or regulation or in the exercise of a discretionary power.

It has been asserted by one commentator that the exceptions contained in the Federal Tort Claims Act are "for the most part well taken" (56 Yale L.J. 561) American observers tend to feel that there must be some limitations on the tort liability of the State. If the State were to be put on the same level as the private citizen, the strain on the public treasury might, it has been feared, prove very great. "Realistically speaking," an American judge has stated, "the state should be free from the vexatious suits based on fictitious grounds which might spring into abundance were the immunity removed." Wolfe, J., concurring in *Niblock v. Salt Lake City,* 111 P. 2d 800, 804 (Utah, 1941).

Britain, which is certainly as solicitous about drains on the public fisc as we are in this country, has seen fit, in the Crown Proceedings Act, 1947, to enact a general principle of State liability in tort without the many exceptions contained in the American Tort Claims Act; and this fact suggests that the dangers involved in complete abandonment of the doctrine of sovereign immunity are not so great as many Americans have feared. Even more important, perhaps, is the fact that in France a system of general State responsibility has been able to function effectively for half a century. The doctrine of sovereign immunity, as the American judge just quoted has remarked, "cannot be defended in any case on ethical grounds." (*Ibid.*). If it can be justified at all, it is only because it is felt to be unwise for practical reasons to abandon it and open the public purse to all who may have claims against the State. The British and French experience prove, however, that the danger referred to is not great enough to justify a doctrine completely indefensible on ethical grounds. Certainly, as a judge of one of our state courts recently declared: "The reasoning which supports the doctrine of sovereign immunity in cases of this character is so fallacious and unsound that it should shock the intelligence, as well as the sense of justice, of those who believe in the American way of life. In my opinion, decisions of this kind are not only productive of widespread disrespect for the law and courts but can be used as the basis for propaganda which affects the stability of our government." Carter, J., dissenting in *Madison v. San Francisco,* 236 P. 2d 141 (Cal. 1951).

Editor's Note: The Editor of the Bulletin would appreciate having state cases worthy of note called to his attention by members of the Section. Communications should be addressed to:

Professor Bernard Schwartz
New York University School of Law
Washington Square South
New York 3, N. Y.

REPORT OF THE COMMITTEE ON COMMUNICATIONS

[August, 1953; not received in time for the August, 1953, issue of the BULLETIN.]

There is submitted herewith the Report of the Committee on Communications of the Administrative Law Section of The American Bar Association.

This Report is submitted without recommendations as to any action to be taken.

Clair L. Stout
Chairman
Committee on Communications
Administrative Law Section

REPORT ON FEDERAL COMMUNICATIONS COMMISSION MATTERS

This report of the Committee on Communications dealing with activities of the Federal Communications Commission will not cover legislation, litigation or matters of substance which fall within the purview of the Standing Committee on Communications of our Association. It will be concerned solely with the development and extensive revisions of the practices and procedures of the Commission made during the past year and the reasons therefor.

The Commission has been primarily spurred on by strong Congressional and other public pressures for the early establishment of a nation-wide television service, as well as by its own internal pressures occasioned by the four-year "freeze" that had, since 1948, prevented the building of new and necessary television stations to provide unserved areas with service and to promote competition with existing services. Responding to these stimuli the Commission began overhauling its procedures and internal mechanisms, some archaic, some rusty and others merely in the way of its goal—to secure as much new television service as possible, as soon as possible, by speeding applications through the administrative processes.[1]

Since July, 1952, when the Commission recommended processing applications for new television stations, there has unquestionably been substantial attainment of its goal. In that time, the Commission has been able to issue more than 375 new television construction permits on uncontested applications; and just at the close of this same period, the first of what will be many decisions after hearing on mutually exclusive applications cleared the final stage of the Commission's hearing procedures.

It is the purpose of this report to make a somewhat detailed examination of these new, modified procedures which will be evaluated from the standpoint of their ef-

[1] An unusually frank statement of the compelling nature of this need for expedition was voiced by the recently appointed Commissioner Doerfer as follows: ". . . the Commission has indicated by its recent actions that a reduction of present contests is welcome to the end that grants of television channels can be made as quickly as prudence and protection of the public interest permit. The temper of the public, as well as the sense of the present Congress—as evidenced in recent hearings and appropriation actions—gives every indication that the emphasis should be upon prompt dispatch of the large backlog of pending applications and less upon fancied wrongs or split-hair equitable considerations of the applicant." (Dissenting Opinion, In re Arkansas Radio & Equipment Co., FCC 53-978, released August 3, 1953.)

fect upon due process and their cost to the overriding public interest of securing the best possible television service for the American people. The Commission's achievement in establishing extensive television service has spoken for itself and needs no elaboration here.

The Commission's revisions of its procedures fall into the following general categories:

A. The Processing of Applications For Licenses

Section 1.382(b) of the Commission's Rules provides that an application for a new television station gains comparative consideration (and hearing status) with another pending before the Commission only if accepted for filing at least the day before final Commission action on the already pending application. By virtue of this Rule, a pending uncontested television application in the past year has remained vulnerable to contest up until the very day of Commission action on it. This inevitably has led to pressures on the Commission for its earliest action to avoid such contest, as well as resulting in the expenditure of administrative effort upon applications apparently uncontested and ripe for grant which subsequently proved to require a full comparative hearing.

For these reasons, the Commission sought administrative processes to minimize the possibility of subsequent competing applications. It did not, however, take the direct method of repealing Section 1.382(b) and establishing a formal cut-off date (after which applications could no longer be contested), but chose rather to move by less direct means. It soon thereafter adopted, as an internal process, a so-called "seven-day rule" providing that where an existing conflict between applicants was resolved, the Commission's staff would "attempt" to process the remaining application to have it ready for final Commission action within from seven to fourteen days. This procedure—seemingly complied with by the staff in most, if not all, instances—did cut down the period of applications' vulnerability to contest. It did so, however, without public notice of any kind, although it is clear that knowledge of this "rule" was soon fairly widespread. Those with knowledge, however, were able by use of this "rule" to so arrange the elimination of pending mutually exclusive applications as to afford as little time as possible (often only a few days) to other potential competitors, before final Commission action on their remaining application was taken.

When such potential competitors protested as a denial of due process grants made after limited public notice of the elimination of competing applicants, the Commission denied such protests solely on the basis that the protestant had had since April, 1952 (the lifting of the "freeze") to file its competing application,[2] even though, as noted, the Commission's own rules had encouraged just such delayed filings by applicants.

In order to increase the protection afforded pending uncontested applications, the Commission on May 25, 1953 publicly

[2] *T. E. Allen & Sons, Inc.*, 9 Pike and Fischer *Radio Regulation* 590 a, 592 (1953), this text hereinafter referred to as — RR —.

modified its processing procedures to provide that upon the dismissal or merger of a once-competing application, the remaining application "may be available for consideration on its merits by the Commission at a succeeding regular meeting as promptly as processing and review by the Commission can be completed." (FCC 53-627)

This rule, as might well have been expected,[3] led to the common practice of the dismissal or merging of competing applications late Tuesday afternoon, so as to permit Commission action on the remaining application at its regular meeting on Wednesday. Little or no notice of the action freeing an application for grant was thereby given potential competitors to such application. This practice was particularly harsh in instances of a merger of two competing applications which resulted in a substantially new application and situation to which no one in the local community or elsewhere was permitted any effective opportunity to respond.

On June 1, 1953, the Commission determined with respect to mutually exclusive applications set for a hearing which had not yet been held, that upon the dismissal of the competing application, the remaining application would be continued in hearing status and not returned to the processing line where it would be exposed to further possible competition. It so decided where such remaining application had received administrative processing prior to being set for hearing which had found it to meet minimum qualifications (In re Woodruff, Inc., 9 RR 385) and then immediately extended this ruling to instances where there had been no such administrative processing or finding (In re John Poole Broadcasting Co., 9 RR 387), the latter overruling its previous decision of a few months earlier (Wichita Beacon Broadcasting, 8 RR 527) —all in the name of the "necessity of bringing television service speedily to a community" (In re Woodruff, supra, at p. 386).

Finally, on July 1, 1953, the Commission proposed to establish a new "cut-off" procedure to provide that no competing television application may be filed more than 30 days after the required advertising of pending television applications in the local community where the channel is assigned. By this procedure, which would delete present Rule 1.382(b), the Commission sought to extend an almost complete "umbrella protection" (or immunity against further competition after 30 days) over all television applications on file with it. It is clear for one thing that the proposed rule is not well timed; if there ever was need for such a rule to provide immunity, the time to be effective is now past, for it comes after the Commission has already in the last year granted 390 construction permits for new television stations, a substantial proportion of those to be granted by it. In addition, the proposed rule would eliminate, often far in advance of Commission action or hearings on it, further competition with a pending application, even if such application were subsequently amended by merger, new stockholders or different financing, etc., thus

[3] See Commissioner Hennock's statement in her Dissenting Opinion to the adoption of this new procedure that "Tuesday afternoon and early evening should hereafter be a busy time at the Commission."

permitting an absolute immunity for an unlimited time to an application radically changed from the one originally on file and advertised. More importantly, the proposed rule is open to serious question in so severely cutting off the opportunity for the filing of competing applications and thus substantially limiting the Commission's choice of the best qualified applicant from among two or more competitors. Inasmuch as the future health of our entire television system depends so heavily upon the Commission's choice of licensees, it would appear that competition among applicants should be encouraged in every way possible, rather than circumscribed as is proposed in order to secure early grants.

The final Commission decision with respect to this proposed rule making, to which comments by interested persons were due on or before August 10, 1953, should be issued shortly. It would seem safe, however, in view of the prevailing Commission attitudes, to anticipate adoption of the rule as proposed, although some modification of it may be made in response to such considerations as set forth above and in the comments that have been filed concerning it.

B. Establishment of the Pre-Hearing Conference

Certainly the most constructive Commission achievement in the past year's revision of its procedures was its adoption on February 6, 1953 of an amended Rule 1.841 providing for a prehearing conference between the parties to any hearing thereafter set by it. This pioneer step in the conduct of administrative proceedings also resulted from the major motivating force felt at the Commission during this period—its desire "to speed up the administrative process," here by shortening and expediting the many hearings that stood in the way of the early initiation of television service.[4] In this volatilely charged field of hearing rights, however, the Commission moved with greater care and circumspection, these changes in its practice stemming "from conferences held by representatives of the Commission and Federal Communications Bar Association for the purpose of ironing out (their) mutual problems . . . ." (FCC 53-119)

Rule 1.841 was intended to accomplish and make possible the saving of time, expense and effort by limiting the hearing and record to the significant points of difference between the parties. It provides that:

> "(a) Except for good cause found in advance by the Hearing Examiner, all broadcast hearings will commence with a conference between the Hearing Examiner, or other presiding officer, and representatives of all parties to the proceeding looking toward agreement on all matters raised with respect to the conduct of the hearing. At this conference, the parties, including Commission counsel should be prepared to discuss (1) the matters relied upon by each of the parties, (2) possibilities of agreement to clarify the issues to be tried in the hearing, (3) admissions of fact and of documents which will avoid unnecessary proof, (4) the need or desirability of

[4] It should be noted, however, that the Commission has not taken one step open to it to expedite its hearing processes, namely, the appointment of a Chief Hearing Examiner to supervise the assignment of cases, a vacancy having existed in this post for the past several years.

obtaining proof by depositions, (5) limitations upon merely cumulative proof, (6) the need for additional conferences, (7) date for commencing the taking of testimony and (8) such other matters as may aid the disposition of the hearing.

"(b) The Hearing Examiner, or other presiding officer, shall issue an order which recites the action taken at the conference; the date of any additional conference or the date for taking of testimony which, in the absence of agreement otherwise, should not be later than 30 days after the issuance of such order if circumstances will permit; the matters relied upon by each of the parties; agreements made by the parties as to (1) admissions of fact and documents, and (2) limitations of proof and other matters, and such order when issued shall control the subsequent course of the hearing unless modified by the Hearing Examiner for cause during the course of the hearing or by the Commission upon a review of the Hearing Examiner's ruling. Proof at the hearing will be adduced only in respect of the matters relied upon by each of the parties, including Commission counsel, set out in such order."

At the same time the Commission amended its Rule 1.387(b) (3) to require that competing applications, in order to be entitled to comparative consideration, should be on file for at least 30 days (rather than the 20 days previously provided) prior to the date of said hearing conference, thereafter to be considered the date for the commencement of the hearing.

Those hearings already held under revised Section 1.841 make clear that this new prehearing conference will sharpen and limit the issues in a hearing and result in the hoped-for savings of time and effort therein.[5] These relatively few cases have, however, also demonstrated that, as applied by the Commission, the new procedure is not without its defects and disadvantages. Only the briefest review of them is possible here. For one thing, the new procedure requires and results in Examiners taking a more active and affirmative role in determining the areas of conflict between the parties and the evidence to be adduced as proof of them than heretofore thought necessary or desirable. This may result in the substantial determination of a case in its early pleading stages rather than after the fullest hearing upon its complete merits. (See *Johnston Broadcasting Co.* v. *FCC*, 175 F. 2d 351 (1949) In addition, there is the very real danger that the concerted efforts to shorten hearings may, if not judiciously kept within reasonable bounds, lead to the denial of a full and fair hearing for one or more of the parties.

As a major example thereof the Commission's repeated emphasis on the desirability of written evidence in order to speed the hearings has had a definite tendency to cause Examiners to cut down sharply on the oral presentation of testimony in comparative hearings, with the result that in some instances the parties' entire direct case may be required to be presented in writing and the appearance of witnesses may be limited to such cross-examination as is sought by opposing counsel. The completely written presentation used by the Commission with some success

[5] For a good example of an Examiner's Order after a Pre-Trial Conference, see *In re Southern Television, Inc.*, 9 RR 566.

in its nation-wide television allocations proceedings (Docket 8736) appears to be the foundation for the present zeal for written evidence; but that proceeding, it should be remembered, was rule-making, legislative in nature and general in scope.

Here the emphasis on written testimony may have the unfortunate but obvious result of having much testimony "canned" in attorneys' offices, thus giving a greater reward to legal literary talent than heretofore possible. More importantly, the growing limitation on witnesses' appearance and oral testimony eliminates one of the fundamental and long-established features of adjudicatory proceedings and takes away one of the material points of difference traditionally relied upon for a choice between contesting parties; i.e., credibility, particularly so here where character qualifications are so vital to a Commission decision and the health of our over-all television service.

It may rightfully be questioned whether proved and valuable legal procedures can be abandoned in order to satisfy the momentary needs of expediency without damaging the full and fair hearing required by due process and without risking greater harm to the public interest than is sought to be avoided.

C. The "Protest" Provisions of Section 309(c) of the Communications Act

The recently enacted "protest" provisions of Section 309(c) of the Communications Act has given rise to a considerable number of Commission decisions setting an unusual pattern of administrative uncertainty and contraditions. This Section provides that:

"(c) When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) hereof, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall contain such allegations of fact as will show the protestant to be a party in interest and shall specify with particularity the facts, matters, and things relied upon, but shall not include issues or allegations phrased generally. The Commission shall, within fifteen days from the date of the filing of such protest, enter findings as to whether such protest meets the foregoing requirements and if it so finds the application involved shall be set for hearing upon the issues set forth in said protest, together with such further specific issues, if any, as may be prescribed by the Commission. In any hearing subsequently held upon such application all issues specified by the Commission shall be tried in the same manner provided in subsection (b) hereof, but with respect to all isues set forth in the protest and not specifically adopted by the Commission, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, in which

event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing."

The Commission, undoubtedly, has been groping its way towards a practical and equitable interpretation of the new and complicated "protest" procedures with its problem made more acute by its own changing membership [6] and its overriding emphasis on the early establishment of additional television service throughout the country. Another significant factor in this regard is the requirement of 309(c) that the Commission act on a protest within 15 days from the date of its filing, which may have resulted in precipitous and insufficiently considered decisions by it. The Commission has, however, already requested the Congress to revise this requirement to permit it 30 days for action upon protests and the House having passed such a bill during its past session, it is likely that 309(c) will be so amended when Congress reconvenes.

One main difficulty with 309(c) has been in determining just who is a "party in interest" entitled to invoke the "protest" procedures. This question had been raised and disputed even prior to the enactment of 309(c) with the Commission opposing its adoption during Congressional hearings on the ground that use of this term "might make possible intervention into proceedings by a host of parties, who have no legitimate interest but (who would participate in such proceedings) solely with the purposes of delaying license grants which should properly be made," and with Congress assuring the Commission that its fears were groundless insofar as the term had already received definitive definition by the Supreme Court's decisions in the KOA case (319 U.S. 239, involving electrical interference) and the Sanders case (309 U.S. 470, involving economic considerations).[7] This pronouncement of Congressional intent proved, however, to be of little, if any, help to the Commission.

The first reversal of Commission position on "party in interest" came with respect to the protest of a licensee of a standard broadcast station against the grant of a television construction permit in the same community which alleged that economic injury would result from the competition of the television station. The Commission, on February 5, 1953, denied the protest on grounds that a radio station was not a party in interest under the rationale of the Sanders case and, in addition, that protestant had not met "the standard of particularity" explicitly required by 309(c) insofar as its "vital allegations are . . . of a completely general or speculative nature. . . ." (*Versluis Radio & Television, Inc.*, 9 RR 102, 104) Yet after protestant appealed this decision to the Circuit Court of Appeals for the District of Columbia, the Commission on March 22, 1953 reconsidered its prior action and determined that the licensee of a radio station did come within the limited category of "party in interest." Nothing was said, however, of the previously asserted failure of protestant to meet the other jurisdictional requirement of

[6] Chairman Hyde (R.) assumed that office on April 18, 1953. Commissioner Doerfer (R.) took office on April 15, 1953.

[7] Senate Report on the 1952 Amendments to the Communications Act.

309(c), i.e., stating the facts it relied on with particularity. (Ibid. at p. 404)

In what was to lead to another *volte-face* the Commission on April 8, 1953 granted the protest of an AM station against the grant of a television application in the same city, its opinion stating that "it is true that the protest does not contain an affirmative allegation of economic injury but we believe that a reasonable inference of probable economic injury flows from the allegations as to protestant's status." (*T. E. Allen & Sons,* 9 RR 197, 198) After oral argument on this protest, however, the Commission held protestant's position to be without merit and made the television grant effective immediately. It went on to say, moreover, upon re-appraisal of the matter, that it should never have granted the protest in the first place since it was insufficient under 309(c) in not stating with particularity the facts relied upon. "These facts must be stated with specificity," its later opinion stated, they must be more than "vague, non-specific conclusionary arguments . . . they must be concrete basic facts." (Ibid. at p. 594)

Precisely the same reversal of Commission position occurred with respect to protests filed in the matters of *Salinas Broadcasting Co.* (9 RR 192, 595) and *WHEC, Inc.* (9 RR 172, 174 (a)). It would appear, however, that both of these protests attained some substantial degree of particularity, especially with regard to their respective allegations that they had been denied due process in not having received adequate public notice of the amending of applications on file prior to their grant by the Commission, which allegations were, considering their nature, seemingly stated with as extensive a particularity as possible.

Yet having reversed itself twice to hold that protestants' allegations had not been stated with sufficient "particularity," the Commission thereafter determined in *Midwest Television, Inc.,* 9 RR 611, that this jurisdictional requirement had been met, even though "The protest leaves much to be desired in making clear how much of the alleged economic injury has resulted and will result from the original grant and how much is attributable to the modification of construction permit which is being protested. . . . However despite the lack of clarity upon which the allegations of economic injury are phrased, we are of the view, upon careful study of the pleading before us, that there exists among said allegations sufficient facts to indicate a reasonable possibility of economic injury . . . to warrant a finding . . . that protestant is a party in interest . . ." (at p. 614). These Commission decisions have not helped define with any degree of certainty the standard of particularity required for a protest; they have left it, if anything, more shadowy and vague than before.

Other aspects of the "party in interest" provisions of Section 309(c) have likewise troubled the Commission. It has extended that category to allow *permittees of a television station,* on grounds of economic injury, to protest a subsequent television grant in its own city and in a city 42 miles away (*Salinas Broadcasting Corp.,* supra, and *Midwest Television Inc.,* supra, respectively). And in a recent case where protestant averred that an act of God (i.e., a flood) had prevented its taking appropriate

field intensity measurements to sustain its protest against the grant of a construction permit for another radio station in the same State, the Commission dismissed the protest on the basis that "the inability of protestant to take field intensity measurements can (not) confer validity upon an otherwise invalid protest. We do not have the legal authority to defer passing upon the validity of a protest pending the completion of field intensity measurements." (*Ville Platte Broadcasting Co.*, 9 RR 584)

Another 309(c) question concerned the type and scope of hearing to be awarded upon the grant of a protest. In *T. E. Allen & Sons*, the Commission held that protestant was entitled only to a hearing on the protested application and that such hearing did not include full (309(b)) comparative consideration between such protested application and protestant's own application, the Commission having previously dismissed the latter as untimely filed under its Rules (supra, at p. 199). To the same effect is *WHEC, Inc.*, supra, at p. 174c. Moreover, in recently granting a Petition for Rehearing (under Section 405 of the Act) directed against its issuance of a construction permit for an AM station, the Commission did not as per its usual practice vacate the authorization (which would have required a comparative hearing with a mutually exclusive application filed in the interim), but rather treated the Petition as if it were a protest under Section 309(c) and thus suspended the effective date of the authorization and set it for a limited hearing under 309(c). The Commission's Opinion stated that "The facts of the case, rather than a petitioner's sometimes fortuitous choice of remedy (under Section 309(c) or 405) should be given controlling effect in determining the status of a protested (sic) grant." (In re *James Gerity, Jr.*, FCC 53-1001, released August 7, 1953)

Granted protests have generally been set for full hearing before an Examiner. Yet, in a number of recent cases the Commission has afforded protestant only an oral argument before the Commission en banc, on the basis that "the only issues raised by protestant were ones of law and policy" so that "309(c) does not require us to hold a fact-finding hearing . . . In view of the type of issues raised by the protest the oral argument herein has afforded the protestant a full and fair hearing." (*Salinas Broadcasting Co.*, supra, at p. 596. See also *T. E. Allen & Sons, Inc.*, supra, at p. 591) In these instances, the Commission has not conformed so strictly to the letter of 309 (c) as it did in the case of *Ville Platte Broadcasting Co.*, referred to above. No authority is given in 309(c) for a limited hearing involving only oral argument before the Commission on a protest. In fact, the Commission's construction of that section would appear to run counter to the express provisions therein that "In any hearing subsequently held upon such application all issues specified by the Commission *shall be tried in the same manner provided in subsection b hereof,*" said subsection requiring a *"full hearing"* when the Commission cannot find that an application will serve the public interest, convenience and necessity. (Emphasis supplied.) As to those issues not specifically adopted by the Commission, 309(c) uses language of an adjudicatory-type hearing in requiring that

"the burden of proceeding with the *introduction of evidence* and the *burden of proof* shall be upon the protestant." (Emphasis supplied.) To limit the hearing on protests to an oral argument as has been done in these instances is to reduce the protest procedure to little more than reconsideration by the Commission of its original decision, scarcely the intent behind the adoption of Section 309(c).

D. Depositions

The Commission, on October 30, 1952, modified its rules of practice (Section 1.821, et seq.) relating to the taking of depositions so as to make such rules "more flexible and liberal" and to bring them into line with the provisions of the Federal Rules of Civil Procedure.[8] Depositions may now be taken upon reasonable notice to other parties, the Commission dispensing with the prior requirements for a motion (upon at least 15 days notice) and Commission Order, as being generally wasteful of the administrative processes inasmuch as no objection was raised in the majority of instances against their taking. Commission processing and determination of deposition questions is now limited to those instances in which a party's objection is made by motion after the required notice of taking has been given.

These new rules, however, were made more restrictive with respect to the use to be made of depositions by providing that depositions of persons "with a substantial interest in or holding a position of responsibility with a party to the proceeding" would not be admitted into evidence at the hearing unless it were shown that the witness were dead, seriously ill or other exceptional circumstances existed, whereas such a limitation had previously been imposed only upon that class of persons who were "a party in interest to the application."

Although the rules do not specifically provide for the taking of depositions for purposes of discovery, they do not exclude them and in at least one recent instance an Examiner has permitted such depositions to be taken by denying a motion to quash made by the Broadcast Bureau. (In re *Peoples Broadcasting Co.*, 9 RR 391) Through use of depositions for discovery it would appear that a new avenue is opened for possible elimination of strike applications prior to commencement of the actual hearing process.

E. Licenses To Continue In Effect Pending Commission Action On Renewal Applications

Pursuant to the provisions of Section 9 b of the Administrative Procedure Act (of 1946) the Commission, on July 30, 1953, adopted a revised Rule 1.384 providing that if, at the expiration of a license, a proper renewal application was pending before it, that such license "shall continue in effect, without further action by the Commission until such time as the Commission shall make a final determination with respect to the renewal application."[9] The

[8] FCC Report and Order, 1 RR, Part 3 at p. 91:1155; see also FRCP, Rule 30.

[9] The Rule is expressly applicable only to licenses "of a continuing activity," but this category includes the great majority of broadcast and other licenses granted by the Commission.

Commission stated, however, that the utilization of Section 1.384 was not to be construed as a favorable finding on the renewal application nor any limitation of its future action with respect to it. In providing for the continuation of the status quo after expiration of license, the Commission rid itself of one of its most painful procedural "headaches"; i.e., the "temporary extension" of license previously required by its Rules in these situations. No longer imposing upon broadcasters the heavy economic burden of being on "temporary license" which, however minor or innocent its cause might be, inevitably had connotations of non-renewal of license and the demise of the station, Rule 1.384 permitted the Commission some administrative flexibility in withholding action on applications for renewal, if necessary, until after the expiration of license.

F. Amended Procedures For Revocation of Licenses and Cease and Desist Orders

The Commission, on April 15, 1953, adopted a revised Rule 1.402 providing for the procedure to be followed upon the attempted revocation of a license or the issuance of a cease and desist order by it. This new Section 1.402 conformed the Commission's Regulations to the statutory provisions for such procedure which had been enacted the previous year.[10] No discussion of the content of these new Sections of the Act and Rules, establishing *inter alia*, a new Commission sanction of cease and desist orders, will be made here, however, in view of space limitations and the wide publicity previously given the so-called "McFarland Act Amendments" to the Communications Act.

G. Revision of Reporting Requirements

During the past year the Commission accelerated its review and revision of its reporting requirements looking toward a reduction of unnecessary paper work for itself, its applicants and licensees. Present indications are for even great activity in this direction in the future.

* * * *

The above has been a necessarily detailed evaluation, against the standard of due process, of the modified procedures adopted by the Federal Communications Commission in the past year. Manifestly, much of what has been accomplished in this regard has proved to be beneficial. With respect to certain other procedures—or some aspects of them—the dark edge of disadvantage to the public interest has already shown itself. The speedy establishment of television service has been the main, and to a large extent a worthy, motivating spirit for the Commission's procedural revisions. However, action in haste—even if with good intention—is often followed by repentance in leisure. At best, one can presently point out such defects as already appear as well as the obvious benefits in these new procedures. The final returns as to their merits, however, will not be in for a long time. The shape, the vigor and the value of this nation's television service will provide most of the ultimate judgment on the processes

[10] Section 312 of the Communications Act of 1934, as amended by Public Law #554, 82nd Congress, 66 Stat. 716, Sec. 10, effective July 16, 1952.

of the Federal Communications Commission.

Arthur W. Scharfeld
Vice-Chairman
Committee on Communications
Administrative Law Section
American Bar Association

August 7, 1953

LEGISLATION RELATING TO THE POST OFFICE DEPARTMENT

H. R. 171 introduced January 3, 1953, by Representative Rees, Chairman, Committee on Post Office and Civil Service, proposes that the Administrative Procedure Act shall not apply to the Post Office Department in the administration and enforcement of section 3 of the Act of March 2, 1889 (39 U.S.C., sec. 255), sections 3929 and 4041 of the Revised Statutes, as amended, (39 U.S.C., secs. 259 and 732), the Act of August 16, 1950 (39 U.S.C., sec. 259a), and sections 1302, 1461, 1463, and 1717 of title 18 of the United States Code. These several statutes deal with the power of the Postmaster General to bar use of the mails to any person, company, corporation, partnership, or association, using the mails for the sale of obscene matter, or to conduct a lottery or fraudulent enterprise.

No hearings have been had or scheduled with reference to H.R. 171. It is understood that the Department is not likely to press for action at this session, if at all, for the reason that S. 18 introduced January 7, 1953, by Senator McCarran to amend the Administrative Procedure Act, and to eliminate certain exemptions therefrom was passed by the Senate on March 6, 1953, and has been pending since that time in the House Committee on the Judiciary.

H. R. 569 introduced by Representative Rees January 3, 1953, by request of the Postmaster General has been considered by the Committee on Post Office and Civil Service and a report (No. 850) was submitted July 16, 1953, recommending its passage. When it shall appear to the Postmaster General reasonable and necessary for the protection of the public, or to be in the public interest, this Bill would authorize the impounding of mail addressed to any person, firm, corporation, company, partnership, or association, upon the institution of proceedings before the Postmaster General against any such persons for the purpose of determining whether any of the orders should be issued, as authorized by section 3 of the Act of March 2, 1889 (39 U.S.C., sec. 255), sections 3929 and 4041 of the Revised Statutes, as amended (39 U.S.C., secs. 259 and 732) and the Act of August 16, 1950 (39 U.S.C., sec. 259a).

The Committee report states that H. R. 569 is similar to a bill which passed the House in the last Congress. It is stated, however, that H. R. 569 contains legislation which spells out legal remedies for persons whose mail is impounded, the language of which was recommended by the American Bar Association prior to the present chairmanship of the Section of Administrative Law.

Under the recommended amendment proposed by the American Bar Association any

person whose mail is impounded in a pending proceeding before the Post Office Department may apply to a United States district court to enjoin the enforcement of the impounding of the mail by showing that the order was capriciously, or improvidently issued, and is not necessary for the protection of the public or in the public interest. Upon filing of such a complaint the court is directed to hear the matter upon not less than five days' notice.

Criticism of the proposed measure stems from the fact that the Act would permit an order broader than justified by the exigencies of the case, in that no distinction is made between the impounding of personal mail and that pursuant to the fraudulent or obscene scheme. In a recent review of an order in obscene mail matter case in the United States District Court for the District of Columbia, Judge Holtzoff directed that the order of the Postmaster General be modified so as not to interfere with the right of the person against whom the order was issued to receive mail at hi residence as distinguished from his place of business.

Wm. I. Denning, Vice Chairman,
Committee on Communications
Administrative Law Section

CHAIRMAN'S PAGE

Over the past year, the section chairman has informed the Council and committee chairmen from time to time of developments concerned with the section's activities. This has been done through mimeographed reports. The Council at Boston suggested that the section chairman attempt to bring the gist of this information to the membership as a whole through a summary in the Bulletin.

This year there definitely are to be four issues of the Bulletin, since the section funds now (with the increased dues) are sufficient. (The last issue, August, 1953, cost about $1 per copy.) With more frequent bulletins, it may be possible to acquaint the members with developments more nearly currently .

One of the big items of preoccupation of the section personnel is the President's Conference on Administrative Procedure, which the section with its endorsement at the 1951 San Francisco meeting, and then the Association pursuant to action of the House of Delegates last February, was instrumental in bringing into existence. That conference has been busily at work. As this is written, it is believed that by the end of November its tentative recommendations, on the first cycle of its existence, will be made public for suggestion and criticisms. At that point we will want, as a section, to consider the tentative recommendations to see what it is felt the position of the Association should be. When those recommendations become available, the views of the membership of the section will be welcomed with respect to them. The matter is in charge of our Committee on Improvement of Administrative Procedures, the chairman of which is Prof. Ralph F. Fuchs, Indiana University School of Law, Bloomington, Indiana. Send your views to him. He and his committee will coordinate the communications, formulate recommendations for the Council (to which the section committed

the matter of cooperating with the President's Conference), which in turn may ask the House of Delegates for authority to take a position on behalf of the American Bar Association.

The section has had in preparation a manual for its committee chairmen. Robert M. Benjamin, the section vice-chairman, has undertaken the laboring oar on this project. The manual will be sent to committee chairmen within the next few weeks, as soon as final revisions and printing can be accomplished. It contains valuable information on the relationship of the sections to the American Bar Association and to each other, limitations on their authority, the field of interest of this section, appointment of committees and their obligations, their dealings with proposed legislation, observation of agency operation, committee reports, and how the approval of the Association for their recommendations may be obtained (without which no section member can appear before any congressional committee or tribunal).

Section organization is just being completed; committee chairmen are being named (see list attached). As might be expected with continuance of the same officers for the second year of their new two-year terms, no major revision of committee chairmanships is being undertaken. You will note the new committees authorized by the Council in the list attached. Should you be willing to undertake assignment to a committee, please communicate with the committee chairman to whom the section chairman has delegated authority to appoint members. If you have been on a committee heretofore, you should continue unless you have withdrawn or have been dropped for failure to respond to communications; but sometimes committee files are so scanty that your name may be missing. To be on the safe side, write the chairman of your committee with respect to your continuing interest.

It is the section chairman's understanding that the following committees, particularly, urgently need able men interested or skilled in the particular fields who are willing and able to participate in committee activity:

Comptroller General—General Accounting Office
Gas and Electric Power
Code of Conduct of Government Employees (recommitted to this section by the House of Delegates at the Boston meeting.)
Government Contracts
Section Development

The matter of selection of committee chairmen is one which your chairman has faced only with misgivings. On the one hand, there are many members (most of them, unfortunately, unknown personally to the chairman) who ought to be called on for committee chairmanships, who would work well and ably, whose ability and actual productiveness would contribute to the profession and the public, but who have not been and are not already committee chairmen. On the other hand, there are current committee chairmen who actually have studied and reported, and whose activity has earned continued appointment. This section chairman dreads a situation where any particular committee chairman regards his post merely as an honor, who

does little or nothing with the duties in his charge, or who does them only if dragged or flogged into it. Accordingly, while as an abstract matter the chairman would avow that new blood should be encouraged, the tendency is to take those who have done a fine job or an adequate job in the past or of whom there is substantial hope there will be an adequate job in the future, and not risk appointment of the untried—however well in fact individuals of them might work out.

At the same time, the chairman has received suggestions of a number of names (some of them too late to take up with the Council) of those who are so highly regarded by individual Council members or committee chairmen and whose qualifications are so manifest that the chairman feels some serious oversights probably have been made. These names are being accumulated to be held for the new chairman you will elect next August in Chicago. The similar suggestions of the membership at large in this respect are solicited.

John W. Cragun,
Chairman.

ORGANIZATION 1953-4

Section of Administrative Law

OFFICERS [1]

CHAIRMAN—John W. Cragun, 744 Jackson Pl., N. W., Washington 6, D. C.

VICE-CHAIRMAN—Robert M. Benjamin, 1 E. 44th St., New York 17, N. Y.

SECRETARY—Patricia H. Collins, Department of Justice, Washington 25, D. C.

COUNCIL [2]

The officers ex-officio and

Charles B. Nutting, School of Law, University of Pittsburgh, Pittsburgh 13, Pa., last retiring chairman

Clarence A. Miller, 2000 Massachusetts Ave., N. W., Washington 6, D. C. (1954)

Harold L. Russell, Citizens & Savings Bank Bldg., Atlanta 3, Ga. (1954)

Douglas L. Edmonds, Supreme Court, State Bldg., San Francisco 2, Calif. (1955)

John B. Gage, Bryant Bldg., Kansas City 6, Mo. (1955)

Reuben Hall, 75 Federal St., Boston 10, Mass. (1956)

E. Blythe Stason, University of Michigan Law School, Ann Arbor, Mich. (1956)

Donald C. Beelar, World Center Bldg., Washington 6, D. C. (1957)

Ralph F. Fuchs, 1410 E. University St., Bloomington, Ind. (1957)

SECTION DELEGATE TO HOUSE OF DELEGATES [3] — Ashley Sellers, 1625 Eye St., N. W., Washington 6, D. C.

Committees On Particular Federal Agencies or Activities

ADVERTISING, TRADE AND SECURITIES REGULATION:

Herman Tocker, Chairman, 734 15th St., N. W., Washington 5, D. C.

[1] The officers were elected in 1952. Their terms were increased to two years by change in the by-laws, and the terms end with the adjournment of the 1954 annual convention.

[2] The terms of council members expire with the annual convention in the year shown following their names.

[3] Term expires with the annual convention, 1954.

Albert J. Brown, Vice Chairman S. E. C. Matters, 225 Bush St., San Francisco 4, Cal.

Sumner Kittelle, Vice Chairman F.T.C. Matters, 420 Lexington Ave., New York, N. Y.

Chester T. Lane, Vice Chairman, 150 Broadway, New York 38, N. Y.

AGRICULTURE, FOOD, DRUGS AND RELATED SUBJECTS:

John D. Conner, Chairman, 1625 Eye St., N. W., Washington 6, D. C.

J. Albert Hutchinson, Vice Chairman, 55 New Montgomery St., San Francisco 5, Cal.

COMMUNICATIONS:

Arthur W. Scharfeld, Chairman, National Press Bldg., Washington 4, D. C.

William I. Denning, Vice Chairman P. O. Dept. Matters, 1518 K St., N. W., Wash. 3, D. C.

COMPTROLLER GENERAL—GENERAL ACCOUNTING OFFICE:

William D. McGraw, Chairman, 303 E. Blackwell St., Tullahoma, Tennessee

Ben Paul Noble, Vice Chairman, 501 13th St., N. W., Washington 4, D. C.

EMERGENCY AGENCIES:

Harry J. Breithaupt, Jr., Chairman, Transportation Bldg., Washington 6, D. C.

Hans A. Klagsbrunn, Vice Chairman, 1200 Eighteenth St., N. W., Washington 6, D. C.

GAS AND ELECTRIC POWER:

Robert H. Young, Chairman, 2107 Fidelity-Philadelphia Trust Bldg., Phila. 9, Pa.

IMMIGRATION AND NATURALIZATION:

Louis L. Jaffe, Chairman, Harvard University Law School, Cambridge 38, Mass.

Jack Wasserman, Vice Chairman, Warner Bldg., Washington 4, D. C.

LABOR:

Milton C. Denbo, Chairman, 1625 K St., N. W., Washington 6, D. C.

Gerard D. Reilly, Vice Chairman, 1120 Tower Bldg., Washington 5, D. C.

NATURAL RESOURCES AND INTERIOR AFFAIRS:

Northcutt Ely, Chairman, Tower Bldg., Washington 5, D. C.

Isadore G. Alk, Vice Chairman, 820 Woodward Bldg., Washington 5, D. C.

Hugh Fullerton, Vice Chairman, 1625 K St., N. W., Washington 6, D. C.

Robert L. McCarty, Vice Chairman, Tower Bldg., Washington 5, D. C.

TRANSPORTATION:

Albert E. Stephan, Chairman, Central Bldg., Seattle 4, Washington

Wendell Berge, Vice Chairman for Trucking Matters, Ring Bldg., Washington 6, D. C.

Edward J. Hickey, Vice Chairman for Transportation-Labor Matters, 620 Tower Bldg., Washington 5, D. C.

David O. Mathews, Vice Chairman for Railway Matters, 332 South Michigan Ave., Chicago 4, Illinois

Donald Macleay, Vice Chairman for Maritime Matters, 1625 K St., N. W., Wash. 6, D. C.

Committees On Particular Legislation Or Proposals

ADMINISTRATIVE PRACTITIONERS—ADMISSION AND ETHICS:

F. Trowbridge vom Baur, Chairman, 1244 20th St., N. W., Washington 6, D. C.

Charles R. Richey, Vice Chairman, Wyatt Bldg., Washington 4, D. C.

Linton M. Collins, Vice Chairman, Tower Bldg., Washington 5, D. C.

ADMINISTRATIVE PROCEDURE ACT:

J. D. Bond, Chairman, 1415 N. Adams, Arlington, Virginia

Smith W. Brookhart, Vice Chairman, 1025 Connecticut Ave., N. W., Washington 6, D. C.

Chisman Hanes, Vice Chairman, 710 Ring Bldg., Washington 6, D. C.

Robert K. McConnaughey, Vice Chairman, 734 Fifteenth St., N. W., Washington 5, D. C.

CODE OF CONDUCT OF GOVERNMENT EMPLOYEES:

John A. McIntire, Chairman, 5317 Carvel Road, Washington 16, D. C.

FINALITY CLAUSES IN GOVERNMENT CONTRACTS:

Glen R. Law, Chairman, 5208 Forty-first St., N. W., Washington 15, D. C.

David Reich, Vice Chairman, Hill Bldg., Washington 6, D. C.

GOVERNMENT CONTRACTS:

Va'entine B. Deale, Co-Chairman, 1001 Connecticut Ave., N. W., Washington 6, D. C.

Robert Sheriffs Moss, Co-Chairman, 1244 20th St., N. W., Washington 6, D. C.

HEARING EXAMINERS:

Robert F. Jones, Chairman, National Press Bldg., Washington 4, D. C.

Robert E. Freer, Vice Chairman, 726 Jackson Pl., N. W., Washington 6, D. C.

IMPROVEMENT OF ADMINISTRATIVE PROCEDURES:

Ralph F. Fuchs, Chairman, 1410 E. University St., Bloomington, Indiana

Frank C. Newman, Vice Chairman, Law School of Harvard Univ., Cambridge 38, Mass.

STATUTORY RENEGOTIATION:

John T. Koehler, Chairman, Investment Bldg., Washington 5, D. C.

W. James MacIntosh, Vice Chairman, 123 S. Broad St., Philadelphia, Penn.

General and Miscellaneous Committees

ADMINISTRATIVE LAW BULLETIN:

Bernard Schwartz, Editor, New York Univ. School of Law, Washington Square, N. Y. 3, N. Y.

ANNUAL MEETING:

William N. Strack, Co-chairman, 33 S. Clark St., Chicago 3, Illinois

John A. Haas, Co-chairman, 228 N. La Salle St., Chicago 1, Illinois

NATIONAL COMMITTEE:

Rufus G. Poole, Chairman, 1625 K St., N. W., Washington 6, D. C.

L. Clair Nelson, Vice Chairman, 1111 E St., N. W., Washington 4, D. C.

ORGANIZATION AND BY-LAWS:

Louisa Wilson, Chairman, 2818 Wisconsin Ave., N. W., Washington 7, D. C.

Jesse E. Baskette, Vice Chairman, 1625 Eye St., N. W., Washington 6, D. C.

PUBLICATIONS:

William F. Schulz, Jr., Chairman, Univ. of Pittsburgh School of Law, Pittsburgh 13, Pa.

SECTION DEVELOPMENT:

Charles E. Smoot, Chairman, American Building, Washington 4, D. C.

STATE ADMINISTRATIVE LAW:

Frank E. Cooper, Chairman, Ford Building, Detroit 26, Michigan